SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1915.

No. .

LEHIGH VALLEY RAILROAD COMPANY

vs.

UNITED STATES, Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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The President of the United States of America, 1

TO

LEHIGH VALLEY RAILROAD COMPANY, GREETING:

YOU ARE HEREBY COMMANDED to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by UNITED STATES OF AMERICA, 2
and to further do and receive what the said Court shall have considered in this behalf; and this you are not to omit under the penalty on you of two hundred and fifty dollars ($250).

Witness, Honorable Charles M. Hough, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 28th day of August, in the year one thousand nine hundred and Fourteen and of the Independence of the United States of America the one hundred and thirty-ninth. 3

ALEX. GILCHRIST, Jr.,
Clerk.

H. SNOWDEN MARSHALL,
U. S. Attorney, Complainant's Sol'r.

The defendant is required to file its answer or other defense in the above cause in the Clerk's office

4 of this Court, on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken *pro confesso*.

ALEX. GILCHRIST, Jr.,
Clerk.

[SEAL.]

Service of the within Subpœna in Equity and Copy of Bill of Complaint in this action is hereby admitted.

Dated Aug. 28th, 1914.

STEWART C. PRATT,
Atty. for Lehigh Valley R. R.

5

I hereby certify: That on the 28 day of August 1914 in the City of New York in my district I served the within with Subpœna in Equity upon the within named defendant Lehigh Valley Railroad Company by exhibiting to Stewart C. Pratt as atty. for said Co. at No. 143 Liberty St., N. Y. City, as per admission of service herein the within original, and at the same time leaving with him a copy thereof, and at the same time and place left with him a copy of Bill of Complaint in this suit.

Dated Aug 29th, 1914.

WM. HINKEL,
6 United States Marshal,
Southern District of New York.

(Endorsed)—U. S. District Court—Filed Aug. 28, 1914—S. D. of N. Y.

UNITED STATES OF AMERICA 7

FOR THE SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA, Petitioner, vs. LEHIGH VALLEY RAILROAD COMPANY, Respondent.	In Equity.

8

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

H. Snowden Marshall, United States Attorney for the Southern District of New York, who petitions herein on behalf of the United States of America, doth, upon information and belief, complain and say:

FIRST: That this proceeding is brought under the authority of Section 3 of an act of the Congress of the United States entitled "An Act to Regulate 9
Commerce with Foreign Nations and Among the States," approved February 19, 1903, and is instituted by the United States of America at the direction of the Attorney General of the United States upon the request of the Interstate Commerce Commission upon information by the said Commission that it has reasonable ground for believing that the respondent herein, Lehigh Valley Railroad Company, is engaged in the carriage of freight traffic

10 between given points at less than the published rates on file and is committing other discriminations forbidden by law.

SECOND: That the Lehigh Valley Railroad Company is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania; and that upon February 1, 1913, it was, and ever since has been, and now is, a common carrier engaged in the transporation of property for hire, wholly by railroad, from one state of the United States to other states of the United States, operating lines of railroad extending from the City of
11 New York by way of the Southern District of New York, through the States of New York, New Jersey, Pennsylvania and New York respectively to Buffalo in said State of New York, and elsewhere.

THIRD: That the New York, Chicago and St. Louis Railroad Company is a corporation organized and existing under and by virtue of the laws of the States of New York, Pennsylvania, Ohio and Indiana, and that upon February 1, 1913, it was, and ever since has been, and now is, a common carrier engaged in the transporation of property for hire, wholly by railroad, over its railway line and route, which connected with the aforesaid rail-
12 way line and route of the Lehigh Valley Railroad Company at Buffalo, aforesaid, and extended thence through the States of New York, Pennsylvania, Ohio, Indiana, and Illinois, to Chicago in said State of Illinois.

FOURTH: That from the time aforesaid until the present time, said corporation common carriers as aforesaid had, and there now is, established, a continuous through railway line and route operated

by said common carriers over their respective rail- 13
way lines and routes aforesaid from the City of New York, in said Southern District of New York, to Chicago aforesaid, under a common management, arrangement and control for the transportation of property for hire in interstate commerce.

FIFTH: That at all the times mentioned herein the Lehigh Valley Railroad Company, as required by law, had established and filed, and kept on file, with the Interstate Commerce Commission of the United States, and had printed and kept open to public inspection at said City of New York, its schedules and tariffs specifying the names of said 14
corporation common carriers and showing, among other things, the joint rates which said corporation common carriers had established and which were from time to time in force and effect for the transportation of certain and divers kinds of property, betwen the said New York and the said Chicago.

SIXTH: That at and during each and all of the times herein mentioned, The New York Chicago and St. Louis Railroad Company aforesaid had filed and kept on file with the Interstate Commerce Commission of the United States, written evidence of its concurrence in and acceptance of the said joint 15
rates in the manner required by law.

SEVENTH: That the corporation common carriers as aforesaid and each of them were and are subject to the provisions of the Act of Congress, approved February 4, 1887, entitled "An Act to Regulate Commerce," and also to the acts of Congress amendatory of and supplemental to said "Act to Regulate Commerce."

16 EIGHTH: That George W. Sheldon and Company is a corporation organized and existing under and by virtue of the laws of the State of Illinois and is engaged in the business of freight forwarding and custom house brokerage in the United States and in non-adjacent foreign countries, maintaining and conducting offices for the transaction of its said business in Chicago, New York, Liverpool, Paris and elsewhere.

NINTH: That in pursuance and as a part of the business of the said George W. Sheldon and Company, the said company contracts with impor-
17 ters of merchandise from foreign countries to the United States, within the United States, to bring the goods of such importers from various points of origin in Europe and other non-adjacent foreign countries to points of destination within the United States, and as incident to such business, performs various other services provided for and required by customs and other regulations attendant upon such importations.

That some of said contracts made by said George W. Sheldon and Company with such importers provide that the said George W. Sheldon and Company will advance the invoice value of the goods handled
18 by said corporation to the seller abroad, for account of the importer, and that the said George W. Sheldon & Company will attend to the drayage of said goods from the foreign factories where the same are manufactured, to the inland railroad station abroad, ship the goods from said inland railroad station abroad to a port of transshipment, and there transfer the said goods to steamships bound for the Port of New York; and upon the arrival of said steamships at the Port of New York,

said George W. Sheldon and Company will make the immediate transportation entry at the custom house, upon such goods as are destined to inland points of the United States, permitting such goods moving under a shipment of this character to go forward in bond, ship the goods by railroad in interstate commerce over and upon the line and route of transportation of the respondent herein, and the connecting line and route of The New York, Chicago and St. Louis Railroad Company to points of destination in Chicago and elsewhere in the United States, and upon the arrival of said goods at such points of destination, said George W. Sheldon & Company will pay the duties upon the importation of such goods and dray the said goods from the railroad station at such points of destination to the warehouse or store of the importer of said goods.

TENTH: That the said George W. Sheldon & Company at times places insurance upon the goods being imported as hereinbefore set out while *en route,* advances foreign taxes, and attends to any and all services and makes all payments necessary for the movement of said goods from their points of origin in foreign countries to points of destination within the United States.

ELEVENTH: That under the said contracts, or some of them, made between the said George W. Sheldon & Company and said importers, the said George W. Sheldon and Company charges the importers a definite rate for this through transportation of said goods from points of origin abroad to domestic points of destination, which said rates are fixed between the said George W. Sheldon and

22 Company and said importers, and said contracts are entered into before the movement of said goods; and said George W. Sheldon and Company makes separate charges against the said importer for payments made by it as hereinbefore mentioned and collects the amounts so advanced from the importer in addition to the stipulated contract price agreed upon between George W. Sheldon and Company and the importer for the transportation of the goods.

TWELFTH: The services rendered by said George W. Sheldon and Company under contracts made
23 as aforesaid often vary in that they may provide for the services hereinbefore set out or may provide solely for the services of transportation from point of origin of goods abroad to points of destination in the United States, in which cases the charges for services furnished by George W. Sheldon and Company are made accordingly. Under some of the said contracts with importers the said importers have the right to, and in some instances do, designate the carriers within the United States to be employed for the transportation of the goods moving under such contracts; and in such contracts the names of such carriers as are to transport the goods mentioned in such contract are set forth.
24 Where importers do not designate the carriers in such contracts with George W. Sheldon and Company goods moving under such contracts are routed over the respondent's line by said George W. Sheldon and Company.

THIRTEENTH: In all cases hereinbefore set forth the said George W. Sheldon and Company contracts in its own name and in its own right with the importer of the goods which are the subject of

the aforesaid contracts with importers, and also with the various carriers whose lines of transportation are employed in carrying the said goods from point of origin abroad to points of destination within the United States. 25

FOURTEENTH: That in carrying out its said contracts with importers said George W. Sheldon and Company is engaged in shipping goods from their points of entry into the United States by railroad, and in interstate commerce, to various points of destination within the United States, and pursuant to some contracts with importers as hereinbefore set forth such goods are, in a large minority of instances, shipped over railroad lines and routes 26 in interstate commerce other than the lines of the respondent herein.

FIFTEENTH: That goods being imported through the agency of the respondent, and which arrive in the City of New York, and which are to be transported from New York City, and from within the Southern District of New York, to Chicago, and which goods are not controlled as to transportation routes by the said contracts of George W. Sheldon and Company and the importer for whom such goods have been imported, are transported in interstates commerce over the line and route of transportation of the respondent herein and over the 27 line and route of said The New York, Chicago and St. Louis Railroad Company; and in all such shipments George W. Sheldon and Company contracts in its own right and name with the respondent for such transportation from New York to Chicago; the consignor and the consignee of said goods being the said George W. Sheldon and Company, and for such transportation of said imported goods this

respondent has collected and received from the said George W. Sheldon and Company the lawfully published rates for the transportation of the said goods.

SIXTEENTH: That there have existed and there now exist between the said respondent and the said George W. Sheldon and Company, certain agreements or understandings whereby this respondent unlawfully pays back and returns to said George W. Sheldon and Company a portion of the said lawfully published rates theretofore, and which are to be, collected for the transportation of imported goods from New York to Chicago as aforesaid, said unlawful payment back and return in some instances being ten per centum of the said lawfully published rates under which the said goods move and are, and are to be, transported from said New York to said Chicago, and in some instances said unlawful payment back and return is five per centum of the said lawfully published rates under which the said goods move and are, and are to be, transported from said New York to said Chicago.

That such unlawful payments back and returns are claimed by the respondent to be in compensation for an alleged agency said to subsist between the said respondent and the said George W. Sheldon and Company under which the said George W. Sheldon and Company solicits and procures the transportation of such import shipments over the line and route of this respondent.

SEVENTEENTH: That there are other firms and corporations engaged in the same general kind and character of business as that of George W. Sheldon and Company and which compete with the said

George W. Sheldon and Company within the United 31
States and in foreign countries, and which said competing firms and corporations consign goods from foreign countries to importers within the United States over and upon the line and route of the respondent, in interstate commerce, under circumstances and conditions substantially similar to those obtaining and prevailing with regard to the shipments handled by George W. Sheldon and Company, to which said competing firms and corporations, however, this respondent makes no such allowance, payment back and return, as aforesaid, or otherwise, as is made by said respondent to said George W. Sheldon and Company. Such other com- 32
peting firms and corporations, however, have no obligation either moral or legal, so far as the respondent is concerned, to transport goods shipped by them over and upon the line and route of transportation of the respondent herein.

EIGHTEENTH: That pursuant to certain contracts made by the said George W. Sheldon and Company with importers of goods originating in non-adjacent foreign countries, the goods moving under such contracts are agreed to be transported from their respective points of destination at a specified and definite charge and expense to the importer of such 33
goods.

NINETEENTH: That upon certain shipments of goods imported as aforesaid, and which were transported from New York to Chicago as aforesaid, over and upon the line and route of transportation of the respondent herein and The New York, Chicago and St. Louis Railroad Company, the said George W. Sheldon and Company have delivered

the said goods to their destination in Chicago at a cost and expense to said George W. Sheldon and Company greater than that provided for under the contract between the said George W. Sheldon and Company and the importer of the goods to be paid by the said importer to the said George W. Sheldon and Company, so that such transportation was carried on at a financial loss to said George W. Sheldon and Company.

TWENTIETH: That upon a majority of the shipments of goods, imported as aforesaid, and which were transported from New York to Chicago as aforesaid, over and upon the line and route of transportation of the respondent herein and the New York, Chicago and St. Louis Railroad Company, the said George W. Sheldon and Company have delivered the said goods to their destination in Chicago at a cost and expense to said George W. Sheldon and Company less than that provided for under the contract between the said George W. Sheldon and Company and the importer of the goods, to be paid by the said importer to the said George W. Sheldon and Company, so that such transportation was carried on at a profit by said George W. Sheldon and Company.

TWENTY-FIRST: That the rates and charges specified for the transportation of goods as aforesaid in the said contracts between said George W. Sheldon and Company and the said importers with whom such contracts are made are not published and filed by this respondent with the Interstate Commerce Commission of the United States; neither are the same published and filed by George W. Sheldon and Company with the said Inter-

State Commerce Commission, nor are the same of 37
a nature that they could or might be lawfully published and filed as aforesaid, in that the said contracts embrace and provide for services other than transportation by railroad within the United States.

TWENTY-SECOND: That said George W. Sheldon and Company has, as consignor and consignee of goods imported under said contracts as aforesaid, and which moved and were transported from New York to Chicago as aforesaid, and which were damaged, injured, or lost in transit between the said New York and the said Chicago, made claim against 38
and collected from this respondent sums of money as compensation for such damages, injury and loss, which sums so collected by George W. Sheldon and Company were duly paid to the importer whose goods were the subject of such loss, injury and damage, and in some instances such claims were made by the importer and payments therefor made by respondent to the importer.

TWENTY-THIRD: That there is keen competition existing between said George W. Sheldon and Company and other firms and corporations engaged in a business of a like character and nature, and the said George W. Sheldon and Company have at 39
times made contracts with importers providing for the importation of goods from points of origin in non-adjacent foreign countries to points of destination within the United States, to wit: Chicago, at less than the actual cost of the said transportation to the said George W. Sheldon and Company.

TWENTY-FOURTH: That the rates of ocean transportation of goods between ports of non-adjacent

40 foreign countries and the Port of New York, and under which shipments as described in this petition move, are not fixed but are variable and fluctuating, among other things being affected by season, ship and quantity of cargo.

TWENTY-FIFTH: Your petitioner further charges and complains that in addition to all and sundry the matters hereinbefore set out relating to the importation, arrival, transportation and delivery of goods, and the payments made by the respondent herein to the said George W. Sheldon and Company, based upon a percentage of the lawfully published
41 and filed rates of said respondent, the said respondent, under and pursuant to an agreement and understanding existing between the respondent herein and said George W. Sheldon, the said respondent has heretofore paid or is now about to pay to said George W. Sheldon and Company an alleged annual salary of $5,000. as compensation for alleged services performed by the said George W. Sheldon and Company for the respondent in procuring the routing of traffic by the said George W. Sheldon and Company over and upon the line and route of transportation of this respondent for such portion of traffic as moves over and upon respondent's
42 line consigned by the said George W. Sheldon and Company which is not embraced in the character of traffic upon which a payment back and return upon a percentage basis as aforesaid is made to said George W. Sheldon and Company.

TWENTY-SIXTH: That any and all alleged services performed by said George W. Sheldon and Company for this respondent and for which said alleged annual salary of $5,000. has been and is about to be paid as aforesaid, are in all respects similar and

like unto the alleged services performed by said 43
George W. Sheldon and Company for the respondent as hereinbefore set out.

TWENTY-SEVENTH: That such traffic as to profit and loss, as to competition, and as to all other matters and conditions, is carried on and conducted in the same manner as the traffic hereinbefore mentioned and described.

TWENTY-EIGHTH: That by reason of the matters and things hereinbefore set out and described, this respondent by means and reason of the payments made and to be made to said George W. Sheldon 44
and Company as aforesaid, has unlawfully demanded, collected and received from said George W. Sheldon and Company a less compensation for services rendered and to be rendered said George W. Sheldon and Company in the transportation of property from New York to Chicago as aforesaid, and subject to the provisions of the Act to Regulate Commerce, than it has lawfully charged, demanded, collected and received and than it will lawfully charge, demand, collect and receive from other persons for doing them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circum- 45
stances and conditions, and that such other persons have therefore been subject to and unless protected by this Honorable Court will be further subjected to unjust discrimination, in violation of Section 2 of said Act to Regulate Commerce, as aforesaid.

TWENTY-NINTH: That by reason of the matters and things hereinbefore set out and described, this respondent has unlawfully made and given and is about unlawfully to make and give said George W.

Sheldon and Company an undue and unreasonable preference and advantage; and has unlawfully subjected and is about to subject other firms and corporations engaged in business similar to and competing with said George W. Sheldon and Company to an undue and unreasonable prejudice and disadvantage in violation of Section 3 of the said Act to Regulate Commerce, as amended.

THIRTIETH: That by reason of the matters and things hereinbefore set out and described, and the payments made and about to be made by the respondent to said George W. Sheldon and Company the respondent has unlawfully failed and neglected to observe and adhere to its lawfully published schedules and tariffs established by it as hereinbefore set out and duly filed with the Interstate Commerce Commission, and the respondent unlawfully has refunded and remitted and is about to refund and remit to George W. Sheldon and Company by means of the payments aforesaid for alleged services performed for the respondent by George W. Sheldon and Company, a portion of rates, fares and charges specified in the published and filed schedules and tariffs of the respondent, and that by reason of such payments made and about to be made by the respondent the respondent unlawfully has extended and is about to extend to George W. Sheldon and Company privileges and facilities in the transportation of property that are not specified in such tariffs of the respondent, all of which is in violation of Section 6 of said Act to Regulate Commerce, as amended.

THIRTY-FIRST: That all of the foregoing charges have been brought to the attention of the said Lehigh

Valley Railroad Company by officers or agents of 49
the United States, but said Lehigh Valley Railroad Company claims the right to agree to pay, and to pay, the said George W. Sheldon and Company the said commission and salary as alleged compensation for services furnished said Lehigh Valley Railroad Company by said George W. Sheldon and Company as hereinbefore set out, and your petitioner is informed and believes that the said Lehigh Valley Railroad Company intends to continue to carry out the said contracts and understandings between it and said George W. Sheldon and Company relating to said commissions and salary for said alleged services of George W. Sheldon and 50
Company, and to carry and transport property in interstate commerce for said George W. Sheldon and Company at less than the published rates as aforesaid, and to discriminate unreasonably against other persons shipping property in interstate commerce over and upon the line and route of transportation of the respondent; and that, unless restrained by this Honorable Court the said respondent by the payment to said George W. Sheldon and Company of certain sums of money alleged to be due the said George W. Sheldon and Company for such alleged services, will knowingly offer, grant and give to the said George W. Sheldon and Com- 51
pany a rebate and commission and will by such action discriminate in favor of the said George W. Sheldon and Company in respect to the transportation of property in interstate commerce between said City of New York and said Chicago, whereby such property shipped by said George W. Sheldon and Company, between said points over and upon the line and route of transportation of this respondent and its connecting common carrier, the said

New York, Chicago & St. Louis Railroad Company, will be transported at a less rate than that named in the tariffs published and filed by such carriers with the Interstate Commerce Commission of the United States, in violation of said Act to Regulate Commerce and the Acts amendatory thereof and supplemental thereto, and in further violation of Section 1 of the "Act to further regulate commerce with foreign nations and among the states," approved February 19, 1903.

WHEREFORE, your petitioner prays:—

I. That a subpœna or other suitable process may issue according to the course of equity requiring the said Lehigh Valley Railroad Company to appear before this Honorable Court, and then and there to make full, complete and perfect answer to all the matters and things hereinabove stated and charged as fully and particularly as if it were specially interrogated in regard thereto, but not under oath, which is hereby waived.

II. That this Honorable Court will summarily inquire into this petition and on final hearing, upon being satisfied of the truth of the allegations contained herein, will enforce an observance of the published and filed tariffs of said Lehigh Valley Railroad Company and forbid and enjoin the further execution or recognition upon the part of said Lehigh Valley Railroad Company of said contracts and understandings between said Lehigh Valley Railroad Company and said George W. Sheldon and Company providing for the payments of commissions and salary, or either of them, to said George W. Sheldon and Company for alleged services in connection with property transported by

the respondent in interstate commerce between said New York and said Chicago and shipped by the respondent. 55

III. That this Honorable Court will forbid and enjoin the payment by said Lehigh Valley Railroad Company to said George W. Sheldon and Company of any and all sums of money alleged to have accrued under the terms of any such contracts or understandings for commissions on freight shipments in interstate commerce for alleged services performed for respondent by said George W. Sheldon and Company in respect to such shipments.

IV. That this Honorable Court will forbid and enjoin the payment by said Lehigh Valley Railroad Company to said George W. Sheldon and Company of any and all sums of money alleged to have accrued under the terms of any such contracts or understandings as salary for alleged services performed for respondent by said George W. Sheldon and Company in respect to freight shipments in interstate commerce and upon which no commissions have been agreed to be paid to said George W. Sheldon and Company by said Lehigh Valley Railroad Company. 56

V. That the Judgment of this Honorable Court may be carried into effect by such orders, writs and processes as may be proper, and as is provided, may be issued under the provisions of Section 3 of said "Act to further regulate commerce with foreign nations and among the States," approved February 19, 1903. 57

VI. That this Honorable Court will grant such other and further relief in the premises as to the

Court may seem meet and as justice and the equities of the cause may require.

And your petitioner will ever pray, etc.

H. SNOWDEN MARSHALL
United States Attorney for
The Southern District of New York,
Solicitor for Petitioner.
Office and Post-Office Address:
U. S. Courts and Post Office
Building, Room 50,
Borough of Manhattan,
City of New York.

(Endorsed)—U. S. District Court.—Filed Aug. 27, 1914.—S. D. of N. Y.

UNITED STATES OF AMERICA

FOR THE SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA, Petitioner, vs. LEHIGH VALLEY RAILROAD COMPANY, Respondent.	In Equity.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

The Lehigh Valley Railroad Company, answering the petition filed herein by H. Snowden

Marshall, United States Attorney for the Southern 61
District of New York—

FIRST: Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraph "First" of petitioner's complaint.

SECOND: Admits the allegations contained in paragraphs "Second" to "Seventh" of petitioner's complaint.

THIRD: Admits on information and belief the allegations contained in paragraph "Eighth" of petitioner's complaint, except that in addition 62
thereto it avers that George W. Sheldon & Company are also engaged in the business of import freight agents for this respondent, the nature of which business and the manner in which it is conducted by the said George W. Sheldon & Company being hereinafter more fully set forth.

FOURTH: Admits on information and belief the allegations contained in paragraphs "Ninth" to "Fifteenth" inclusive, of petitioner's complaint.

FIFTH: Admits that there has existed an agreement between this respondent and George W. Shel- 63
don & Company under the terms of which agreement this respondent paid to the said George W. Sheldon & Company certain sums for services performed by the said George W. Sheldon & Company for this respondent. It admits that certain of the sums paid by it to the said George W. Sheldon & Company for services rendered this respondent by that company were computed upon freight charges received by this respondent for freight moving over

its line that was solicited and secured by the said George W. Sheldon & Company, but it denies that the payment of any of the said sums by this respondent to the said George W. Sheldon & Company was unlawful.

SIXTH: Admits on information and belief the allegations contained in paragraph "Seventeenth" of petitioner's complaint. As regards the other firms and corporations mentioned in said paragraph which, it is alleged, are engaged in business similar to that conducted by George W. Sheldon & Company, this respondent avers that the said firms and corporations in addition to being under no moral or legal obligation to transport goods shipped or controlled by them over the line of this respondent, have never made any complaint either to the Interstate Commerce Commission or to this respondent as to the arrangement existing between this respondent and the said George W. Sheldon & Company nor have any of such firms or corporations ever, either directly or indirectly, requested this respondent to reimburse them for traffic routed by them over this respondent's line nor have they ever complained that this respondent discriminated in any way against them and in favor of George W. Sheldon & Company by reason of the relations existing between this respondent and the said George W. Sheldon & Company.

SEVENTH: Admits on information and belief the allegations contained in paragraphs "Eighteenth" to "Twenty-second", inclusive, of petitioner's complaint.

EIGHTH: Admits on information and belief the allegations contained in paragraph "Twenty-third"

of petitioner's complaint. It avers, however, that 67
in all cases where the said George W. Sheldon & Company have entered into contracts for the importation of goods from non-adjacent foreign countries to points of destination within the United States for a sum less than the total transportation charges of the various carriers who participated in the transportation of such shipments that such contracts were due solely to the said George W. Sheldon & Company's inability to estimate the exact amount of freight charges that would be assessed by the various carriers and that in no case has George W. Sheldon & Company knowingly agreed to effect the transportation of such goods for a less 68
sum than the total of the transportation charges of the said carriers.

NINTH: Admits the allegations contained in paragraph "Twenty-fourth" of petitioner's complaint.

TENTH: Admits the allegations contained in paragraph "Twenty-fifth" of petitioner's complaint, except that it avers that the payment which this respondent is about to make to George W. Sheldon & Company is in return for real and substantial services performed by George W. Sheldon & Company for this respondent, the nature and 69
character of which services are hereinafter more fully set forth.

ELEVENTH: Admits that the annual salary paid by this respondent to the said George W. Sheldon & Company is for services performed by the said George W. Sheldon & Company which are similar in nature to the services rendered this respondent by George W. Sheldon & Company for which

70 George W. Sheldon & Company receive from this respondent compensation based upon the amount of the freight charges accruing from freight solicited, procured and routed by George W. Sheldon & Company over the line of this respondent. The nature and character of the services of the said George W. Sheldon & Company for which they receive an annual salary from this respondent will be more fully hereinafter set forth. Subject to the above qualifications, this respondent admits the allegations contained in paragraphs "Twenty-sixth" and "Twenty-seventh" of petitioner's complaint.

71 TWELFTH: Denies each and every allegation contained in paragraphs "Twenty-eighth" to "Thirtieth", inclusive, of petitioner's complaint.

THIRTEENTH: Admits that Officers and Agents of the United States have addressed this respondent with respect to its relations with the said George W. Sheldon & Company and admits that this respondent intends to continue its relations with George W. Sheldon & Company as conducted in the past unless this Honorable Court decrees that such relations constitute a violation of any of the various Acts to regulate commerce. It denies, however, each and every other allegation contained in
72 paragraph "Thirty-first" of petitioner's complaint.

FOR A COMPLETE AND SEPARATE DEFENSE TO THE CAUSE OF ACTION STATED IN PETITIONER'S COMPLAINT THIS RESPONDENT RESPECTFULLY SHOWS, ON INFORMATION AND BELIEF:

That for more than twenty-five years the firm of George W. Sheldon & Company has been employed by and has been acting for the Lehigh Valley Rail-

road Company in the solicitation and procural of 73
traffic originating in Europe and destined to interior points within the United States; that the business moving over the line of this respondent due to the solicitation of George W. Sheldon & Company, although comparatively small at the inception and during the first few years of George W. Sheldon & Company's employment, has gradually increased in volume so that at the present time the traffic moving over the rails of this respondent to interior points within the United States procured by the solicitation of George W. Sheldon & Company represents an enormous volume of traffic, in the year 1910 alone amounting to 54,232,076 74
pounds. with a resultant revenue to this respondent of $185,883.05. Although George W. Sheldon & Company are not engaged entirely in the solicitation and procural of import traffic for movement over the line of this respondent, yet nevertheless the solicitation of business by them for this respondent represents a not inconsiderable portion of their business activities. In the furtherance of their business arrangement with this respondent their offices located in various cities in Europe and their employes at such offices are utilized to such an extent as may be necessary to carry out the terms of the arrangement entered into between 75
George W. Sheldon & Company and this respondent. For example—the employes of George W. Sheldon & Company at their various offices systematically and diligently seek to influence the routing of freight destined to interior points in the United States over the lines of this company. Also at the said European offices of George W. Sheldon & Company this respondent's tariffs, duly published and filed with the Interstate Commerce Commis-

76 sion at Washington, D. C., are kept on file, such tariffs being accessible to and used by not only George W. Sheldon & Company but also by European shippers to determine the rates and charges for the movement of their freight from port of entry in the United States to the interior point of destination to which goods are to be forwarded. Furthermore, in certain of the tariffs filed by this respondent with the Interstate Commerce Commission at Washington, D. C., and kept on file at the European offices of G. W. Sheldon & Company, there appears and has appeared for a number of years, the name of George W. Sheldon & Company,
77 they being designated in such tariffs as the Import Agents of this respondent.

Owing to the other activities of George W. Sheldon & Company in a business way in Europe, their numerous offices and wide connections, they were and are pre-eminently fitted and equipped to carry on the business of Import Freight Agents of this respondent in Europe, for not only do they solicit and procure traffic for movement over the line of this respondent, but they are, and have been constantly called upon by this respondent to perform many services in connection with the solicitation of import business which it would have been prac-
78 tically impossible for this respondent to perform without a highly organized corps of employes in Europe whose duty it would be to attend to nothing but business relating exclusively to the solicitation and procural of freight for movement over the line of this respondent originating in various cities in Europe and destined to interior cities within the United States.

The expense of this respondent's maintaining a separate European organization for the handling

of this import business would be absolutely prohibi- 79
tive and therefore had this respondent not entered into an arrangement with George W. Sheldon & Company to conduct this really important branch of its business, this respondent never would have been able to compete for this import traffic and if the arrangement which has existed and which now exists between the said George W. Sheldon & Company and this respondent is found by this Honorable Court to be in violation of any of the various Acts to Regulate Commerce, this respondent will be obliged to retire at great loss to itself from the field of European solicitation.

The value of the services performed by George 80
W. Sheldon & Company could, from their very nature, only be measured by the amount of freight which that company caused to be sent over the line of this respondent and accordingly it was agreed that as compensation for their services George W. Sheldon & Company would receive ten per cent. of all freight charges collected on all traffic rated from first to third class, inclusive, as shown in the Official Classification (published and filed with the Interstate Commerce Commission at Washington, D. C.) solicited and routed by them over this respondent's line and that for all traffic rated from fourth to sixth class, inclusive, in the Official 81
Classification, solicited and routed by them over this respondent's line, they would receive five per cent. of the freight charges collected by this respondent. In addition to the compensation above recited, paid by this respondent to George W. Sheldon & Company, this respondent has also paid to George W. Sheldon & Company an annual salary of five thousand dollars, that sum being intended to reimburse them for shipments of commodity freight

82 routed by them over this respondent's line which had no rating in the Official Classification and also to assure them of a fixed compensation for the multitudinous other services performed by them for this respondent. This respondent therefore denies that the arrangements, herein fully set forth, existing between this respondent and George W. Sheldon & Company constitute either directly or indirectly any violation whatsoever of any of the provisions of the "Act to Regulate Commerce" or of any of the Acts amendatory thereof or supplementary thereto.

83 WHEREFORE, this respondent prays that the petition filed herein by the District Attorney for the Southern District of New York on behalf of the United States of America be dismissed.

And your respondent will ever pray, etc.

E. H. BOLES,
STEWART C. PRATT,
Attorneys for Respondent,
Lehigh Valley Railroad Company,
Office and Post Office Address,
143 Liberty Street,
Borough of Manhattan,
City of New York.

84

STATE OF NEW YORK }
County of New York } ss.

STEWART C. PRATT, being duly sworn, deposes and says that he is the attorney for the Lehigh Valley Railroad Company, the defendant in the action herein, which is a corporation organized, created and existing under and by virtue of the laws of the State of Pennsylvania and not located in this State, and that the foregoing answer is true

to the knowledge of deponent, except as to those 85
matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true; that the sources of deponent's information and the grounds for deponent's belief as to the allegations in the answer said to be made on information and belief are statements made to deponent by officers of the Lehigh Valley Railroad Company, the respondent herein, having personal knowledge of the matters or things stated by them to the deponent, and also statements made to the deponent by officers of George W. Sheldon & Company having personal knowledge of the matters or things stated by them to the deponent; and that the 86
reason why this verification is not made by the party is that the party is a foreign corporation.

STEWART C. PRATT.

Sworn to before me this 23rd day of September, 1914.

WILLIAM F. GLEESON

[NOTARIAL SEAL]

Notary Public, Kings Co. No. 72
Certificate filed in N. Y. Co. No. 92
New York Register No. 6187

A copy of the within paper has been this day received at this office Sept 23, 1914.—H. Snowden Marshall U. S. Attorney. 87

(Endorsed)—U. S. District Court.—Filed Sept. 23 1914.—S. D. of N. Y.

88 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA vs. LEHIGH VALLEY RAILROAD COMPANY	In Equity E—11—375. Stipulation.

89 It is hereby stipulated and agreed by and between the solicitors for the respective parties hereto that for the purposes of this action the facts hereinafter enumerated and set forth may be taken as proved upon the trial of the above entitled action.

1. That the allegations of jurisdictional facts set out in paragraph "First" of petitioner's bill herein are true, and that this Court has ample and complete jurisdiction of the issues of law and of fact herein.

2. That making reference particularly to para-
90 graph eighth of respondent's answer to paragraph "twenty-third" of petitioner's bill, George W. Sheldon & Company at all times knew and were acquainted with respondent's lawful rates, tariffs and charges from time to time in force and effect, for the transportation of all classes of goods and commodities imported from abroad, and transported by the respondent at the instance of said George W. Sheldon and Company in the manner set out in petitioner's bill from New York to Chi-

cago and elsewhere, and that any inability upon 91
the part of George W. Sheldon and Company to estimate the exact amount of freight and charges that would be assessed by various carriers, as alleged in paragraph "Eighth" of respondent's answer herein has no application to the rates, tariffs and charges of the respondent upon the transportation by it of goods from New York to Chicago and elsewhere, as set out in petitioner's bill.

3. That of the traffic alleged to have moved in interstate commerce over the rails of respondent to interior points within the United States, and 92
procured through the solicitation of George W. Sheldon and Company as set out in Folios 13 and 14 of respondent's answer, a large part, to wit, not less than a five-sixths portion thereof was, and is traffic procured and contracted for by said George W. Sheldon and Company with importers within the United States under contracts such as are alleged in petitioner's bill to exist between such importers and said George W. Sheldon and Company, and further, was and is traffic for the transportation of which said George W. Sheldon and Company received compensation from such importers, as set out in Paragraph "Eleventh" of
the petitioner's bill herein, and upon such traffic 93
commissions were paid to George W. Sheldon and Company in the manner complained of in the bill herein. The balance of said traffic, to wit, one-sixth thereof, is procured and routed over respondent's line of transportation through and by reason of the activities of said George W. Sheldon and Company in non-adjacent foreign countries, and in the shipment of all such traffic, both that secured in this country and abroad, George W.

94 Sheldon and Company performs generally the functions of a forwarder, and upon the arrival of the said traffic in the United States acts both as consignor and consignee in shipping such traffic in interstate commerce over and upon the line and route of transportation of this respondent.

4. Tariffs of respondent now on file with the Interstate Commerce Commission do not carry the name of George W. Sheldon and Company as import agents of the respondent.

March 6, 1915.

H. SNOWDEN MARSHALL,
95 U. S. Attorney,
Solicitor for Petitioner.

(Endorsed)—U. S. District Court.—Filed March 27, 1915.—S. D. of N. Y.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA Petitioner 96 vs. LEHIGH VALLEY RAILROAD COMPANY, Respondent.	In Equity E-11-375 Notice of Motion.

SIRS:

PLEASE TAKE NOTICE, that upon the bill and answer, and the stipulation of facts entered into by

the respective parties to this cause, and filed herein, 97
the petitioner will, at a term of this court to be holden upon March 12, 1915 at Room 235 of the United States Court House and Post Office Building, Borough of Manhattan, City of New York, at 10:30 o'clock A. M. of that day, or as soon thereafter as counsel can be heard, move the court for the relief prayed for in the petitioner's bill herein.

Yours, &c.,
H. SNOWDEN MARSHALL,
Solicitor for Petitioner
Office & P. O. Address:
U. S. Court House and Post
Office Building, 98
Borough of Manhattan,
City of New York.

To:
E. H. BOLES, Esq.,
STEWART C. PRATT, Esq.,
Solicitors for Respondent,
143 Liberty Street, N. Y.

New York, March 6, 1915.

Due and timely service of the within notice of motion is hereby admited—March 6, 1915.—E. H. Boles, Stewart C. Pratt, Solicitors for Respondent.

(Endorsed)—U. S. District Court.—Filed March 99
27, 1915.—S. D. of N. Y.

100 DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA vs. LEHIGH VALLEY RAILROAD COMPANY.	No. E.—11—375.

101 ACTION IN EQUITY; HEARING ON BILL AND ANSWER.

MESSRS. JOHN C. KNOX, Assistant U. S. Attorney, and CHARLES W. NEEDHAM, counsel for Interstate Commerce Commission, for complainant;

ALAN MCCULLOH, Esq., for defendant.

Memorandum.

Sheldon & Company are forwarders, a business the nature of which is sufficiently stated in *Interstate Commerce Commission* vs. *D., L. & W. R. R. Co.*, 220 U. S. 235. These particular forwarders
102 send all the goods they can over the Lehigh Valley, and have done so for a long time. In consideration of the business thus obtained the defendant pays to Sheldon & Company a commission calculated upon the freight moneys (at published tariff rates) received by the Railroad from Sheldon & Company.

The object of this bill is to prevent the continuance of this practice for the reason that Sheldon & Co. are shippers, and when they get a commission

upon freights which they themselves have paid,— they necessarily obtain a rebate or concession in violation of the Interstate Commerce Act as amended to August 24, 1912,—Section 6 thereof, viz.: 103

> "Nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are specified in such tariffs."

It is also said that such payment of commissions is in violation of the Elkins Act as amended June 29, 1906, viz.: 104

> "It shall be unlawful for any person * * * to receive any rebate, concession or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce * * * whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier."

105

It is assumed that all the freight sent by Sheldon & Company over the Lehigh Valley, and in respect of which commissions are paid, is freight not owned by said Sheldon & Company, but as to which they act as forwarders only.

This does not make Sheldon & Company any the less a shipper.

The relation of shipper and carrier is formal, and must respond to certain well known tests. It has

106 no relation to ownership. A shipper is one who ships even when he has no right so to do; but a forwarder is one whose business it is to ship; and I am unable to see how it can be doubted (and I do not think it has been denied) that when Sheldon & Company send goods over the Lehigh Valley road in their own name they are in a position to insure, to demand and receive delivery, and to recover for breaches of the contract of carriage entered into between themselves and the carrier;—these are the indicia of the formal and legal relation entered into by the issuance of a shipping receipt or bill of lading.

107 I have no doubt that Sheldon & Company are to be regarded as shippers for every purpose, and consider this conclusion to be supported by *Great Northern R. R. Co.* vs. *O'Connor,* 232 U. S. 508.

The Railroad seeks to justify its custom by asserting the right to pay commissions to those who bring it business, and in support of this proposition cites *United States* vs. *D., L. & W. R. R. Co.,* 152 Fed. Rep. 269, where the Court said:

> "The carrier has a right to employ persons to solicit business just as it has a right to employ clerks and employees of all kinds to do the business, and any payments for such
> 108 purpose cannot constitute a rebate, concession or discrimination within the meaning of the act."

This is all true, but I do not think that the situation is brought within this decision when a shipper is employed and the amount of his wage or the value of his services is regulated or gauged by the freight value of his shipments.

The result may be perfectly moral (though the method is capable of great abuse); but the result in

my judgment is illegal because of the bald fact that 109
when the dealings between Sheldon & Company and the Railroad are ended, the result is that Sheldon has paid less for the transportation of goods in which he had a special property and as to which he was a shipper, than did other persons not engaged in the forwarding business.

It is also obvious that if the real owner of the goods preferred to send over some railroad other than the Lehigh Valley, Sheldon & Company as forwarders would be obliged to acquiesce in their customer's desire, and would get no commission upon goods so forwarded.

I am quite willing to admit that in this partic- 110
ular instance (as is elaborately set forth in the answer) there is nothing wrong, dishonest or immoral in the transactions complained of; but they seem to me to be against the letter of the law, and I am further of opinion that such letter must be strictly enforced in order to preserve equality among shippers, for the abuse of granting commissions to any large shipper is so patent and so ancient as not to require further comment.

This conclusion has not been reached without due consideration of the charge to the jury of the late Judge Martin in the case of *United States* vs. *Sheldon*. From the charge alone (which is all 111
I have before me) I should hesitate to think that the matter before Judge Martin was put in exactly the same way as is this cause; but even if these very facts were contained in an indictment instead of a bill in equity, Judge Martin's decision (if applicable) would be to me but another illustration of the radical difficulty of attempting to "govern by indictment" and of securing convictions for statutory violations involving no moral turpitude. Even

112 Judges instinctively "shy" at branding as a convict any man for failing promptly to square an honest business with new-fangled statutes, and permitting or encouraging juries to find that criminal intent which is still a prerequisite for conviction under such circumstances.

The complainant will take a decree forbidding the continuance of commission payments to Sheldon & Co. under the circumstances revealed by bill and answer.

March 26, 1915.

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113 DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA vs. LEHIGH VALLEY RAILROAD COMPANY.	No. E.—11—375.

Memorandum on Settlement of Decree.

114

The decree proposed by the United States attorney specifically enjoins the defendant from continuing to pay George W. Sheldon & Company "any and all sums of money whether the same be in the form of commissions, *salary* or otherwise, and which may have accrued and which would accrue but for this decree under and pursuant to the contracts and understandings hereinbefore adjudged and decreed to be unlawful."

It is now suggested (and probably with truth) 115
that my opinion was not clear as to whether moneys could or could not be paid to George W. Sheldon & Company under the name of salary and as compensation for that corporation's activities in procuring freight for the Lehigh Valley.

It is in my judgment just as much an infraction of the law to pay a shipper a salary for shipping his own freight as it is to pay him a commission for doing the same thing. This whole case revolves around the question whether under all the circumstances shown Sheldon & Company are to be regarded as shippers for every purpose. I think they are shippers, and any form of compensation to them 116
for shipping is against the law.

I have accordingly signed the decree as proposed.

April 6, 1915.

C. M. HOUGH,
D. J.

117

118 UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA, Petitioner, vs. LEHIGH VALLEY RAILROAD COMPANY, Respondent.	In Equity 11-375.

119 NOTICE OF ENTRY OF DECREE.

SIRS:

PLEASE TAKE NOTICE, that a decree, a copy of which is attached hereto, was, upon the 6th day of April, Nineteen hundred and fifteen, duly filed and entered with the Clerk of the United States District Court for the Southern District of New York.

Respectfully,

H. SNOWDEN MARSHALL,
United States Attorney for the
Southern District of New York,
Attorney for Petitioner;
120 Office and Post Office Address:
U. S. Court and P. O. Building,
Borough of Manhattan,
City of New York.

To:

EDGAR H. BOLES, Esq.,
STEWART C. PRATT, Esq.,
#143 Liberty Street,
ALLAN MCCULLOH, Esq.,
#165 Broadway,
Solicitors for Respondent.

At a Stated Term of the United States District Court, held in and for the Southern District of New York, at the United States Court House and Post Office Building, Borough of Manhattan, City of New York, on the 6th day of April, 1915. 121

Present:

HON. CHARLES M. HOUGH,
United States District Judge.

UNITED STATES OF AMERICA Petitioner, vs. LEHIGH VALLEY RAILROAD COMPANY, Respondent	122 In Equity E-11-375.

DECREE

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration, the Court doth

123

ORDER, ADJUDGE AND DECREE that the certain agreements or understandings existing between the respondent, Lehigh Valley Railroad Company, and George W. Sheldon and Company, whereby said Lehigh Valley Railroad Company has agreed to pay back, return, refund and remit to George W. Sheldon and Company a portion of the rates and charges provided for in the lawfully published and filed tariffs of the said Lehigh Valley Railroad Com-

124 pany, and assessed, charged and collected from George W. Sheldon and Company by said Lehigh Valley Railroad Company for the transportation, in interstate commerce, over and upon the line and route of said Lehigh Valley Company of goods and property consigned and shipped by said George W. Sheldon and Company, are unlawful as being in violation of the provisions of an Act of Congress entitled "An Act to Regulate Commerce" approved February 4, 1887, as amended, and in further violation of the provisions of an Act of Congress entitled "An Act to further Regulate Commerce with Foreign nations and among the States," as amended
125 June 29, 1906.

WHEREFORE, it is further ORDERED, ADJUDGED AND DECREED as follows:—

FIRST:—That Lehigh Valley Railroad Company, its officers, agents, servants, employees and all persons acting under or on behalf of any of them are hereby severally enjoined, restrained and prohibited from paying to George W. Sheldon and Company, a corporation organized under the laws of the State of Illinois, or to its officers agents, servants or employees, or to any person or persons acting under or on behalf of any of them, any and
126 all sums of money, whether the same be in the form of commissions, salary or otherwise, and which may have accrued, and which would accrue but for this decree, under and pursuant to the contracts and understandings hereinbefore adjudged and decreed to be unlawful.

SECOND:—That said Lehigh Valley Railroad Company, its officers, agents, servants and employees and all persons acting under or on behalf of them,

are hereby severally enjoined, restrained and pro- 127
hibited from the further execution or recognition of the said contracts or agreements, hereinbefore adjudged and decreed to be unlawful, in any such manner, method or device as will permit and enable property heretofore or hereafter shipped in interstate commerce by George W. Sheldon and Company, over and upon the line and route of transportation of Lehigh Valley Railroad Company, to be transported at rates and charges less than those named in the lawfully published and filed tariffs of said Lehigh Valley Railroad Company.

THIRD:—That the United States may at any time 128
apply to the Court for such additional order or orders as it may deem necessary to carry out this decree according to the true intent and meaning thereof. Any such application for any further order herein shall be upon reasonable notice given according to the rules of this Court; and for the purpose of making any such order jurisdiction of this case is retained.

FOURTH:—That Lehigh Valley Railroad Company shall pay the costs of this suit taxable against it.

C. M. HOUGH, 129
U. S. D. J.

New York, April 6, 1915.

(Endorsed)—U. S. District Court.—Filed April 6, 1915.—S. D. of N. Y.

130 DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA, Petitioner, vs. LEHIGH VALLEY RAILROAD COMPANY, Defendant.	In Equity. 11/375.

131

The petitioner in the above entitled cause, filed its bill of complaint, which is hereunto annexed, on the 28th day of August, one thousand nine hundred and fourteen, and the writ of subpœna was thereupon issued, and returned served.

On the 23rd day of September, 1914, thereafter, an answer to said bill of complaint was filed, the same being hereto annexed.

On the 27th day of March, 1915, thereafter, the petition filed a stipulation as to the facts, the same being hereto annexed.

132 Afterwards, and at the March term, 1915, of said Court, present the Honorable Charles M. Hough, Judge, the said cause came on to be heard on petitioner's motion for judgment, and was argued by counsel. On the 6th day of April, one thousand nine hundred and fifteen, a decree of said Court was filed and entered in favor of the petitioner, by which it was adjudged that a perpetual injunction should issue against the defendant, and that the defendant pay the costs of this suit tax-

able against it; the said order being hereto annexed. 133

And the costs having been taxed by the clerk at Forty-two & 22/100 ($42.22) dollars, the process, pleadings, and decrees together with other papers filed in said cause, are duly annexed hereunto.

Wherefore let the said United States of America recover of said Lehigh Valley Railroad Company the sum of Forty-two & 22/100 ($42.22) dollars, as adjudged in said final decree, the costs and charges as taxed.

Signed and enrolled this 19th day of April A. D. 1915.

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ALEX GILCHRIST, JR.,
Clerk.

(Endorsed)—U. S. District Court.—Filed Apr. 19, 1915, 1:30 P. M.—S. D. of N. Y.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

LEHIGH VALLEY RAILROAD COMPANY, Appellant, vs. UNITED STATES OF AMERICA, Appellee.	In Equity No. E—11—375. Petition for Appeal.

137

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

Comes now the Lehigh Valley Railroad Company by E. H. Boles and Stewart C. Pratt, its Solicitors of record, and the Lehigh Valley Railroad Company, conceiving itself to be aggrieved by the order and decree made and entered by the above named Court in the above entitled cause, under date of April sixth, Nineteen hundred and fifteen, in the manner and instances set forth in the assignment of errors filed in said cause, does hereby appeal to the present term of the Supreme Court of the United States from said order and decree and each and every part thereof; and that the Lehigh Valley Railroad Company prays that this, its petition for its said appeal, may be allowed; that a transcript of so much of the record on which said order and decree so appealed from was made, and the subsequent proceedings and papers in this suit as may be deemed sufficient by this Court, duly authenticated,

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may be sent to the Supreme Court of the United 139
States, and that said order and decree and each and every part thereof so appealed from may be reversed.

New York, April 27th, 1915.

E. H. BOLES
STEWART C. PRATT,
Solicitors for Lehigh Valley Railroad Company,
Office and Post Office Address,
143 Liberty Street,
Borough of Manhattan,
City of New York.

The foregoing appeal is hereby allowed. 140

LEARNED HAND
U. S. District Judge.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

LEHIGH VALLEY RAILROAD COMPANY, Appellant, vs. UNITED STATES OF AMERICA, Appellee.	In Equity No. E.-11-375 141 Assignment of Errors.

NOW COMES the Appellant by E. H. Boles and Stewart C. Pratt, its Solicitors, and makes and files the following assignment of errors which it

142 alleges occurred on the trial of this action and upon which it will rely in the prosecution of its appeal:

I. The Court erred in holding and deciding that George W. Sheldon & Company, mentioned in the Appellee's bill, were to be regarded as shippers for every purpose when forwarding property over the railroad of the Appellant and over the railroads of its connections.

II. The Court erred in holding and deciding that the payment of commissions by the Lehigh Valley Railroad Company to George W. Sheldon & Com-
143 pany resulted in the final analysis in Sheldon & Company paying less for the transportation of goods over the Lehigh Valley Railroad Company and its connections than did other persons not engaged in the forwarding business and forwarding property over the line of the Lehigh Valley Railroad Company and its connections.

III. The Court erred in holding and deciding that the payment of a salary by the Lehigh Valley Railroad Company to George W. Sheldon & Company resulted in the final analysis in Sheldon & Company paying less for the transportation of
144 goods over the Lehigh Valley Railroad Company and its connections than did other persons not engaged in the forwarding business and forwarding property over the line of the Lehigh Valley Railroad Company and its connections.

IV. The Court erred in holding and deciding that the payment of a salary and commissions by the Lehigh Valley Railroad Company to George W. Sheldon & Company constituted a violation of Sections 2, 3 and 6 of the provisions of an Act of

Congress entitled "An Act to Regulate Commerce," 145
approved February 4, 1887, as amended, and constituted a violation of the provisions of Section 1 of the "Act to Further Regulate Commerce with Foreign Nations and Among the States" approved February 19, 1903.

V. The Court erred in failing to hold and decide that the Lehigh Valley Railroad Company was justified in employing George W. Sheldon & Company as its Agents to solicit business and to perform all such other acts that properly, naturally and reasonably the said Sheldon & Company might be called upon by the said Lehigh Valley Railroad 146
Company to perform because of such agency relation.

VI. The Court erred in failing to hold and decide that the Lehigh Valley Railroad Company was justified in paying the said George W. Sheldon & Company a certain commission, based upon the amount of freight forwarded by George W. Sheldon & Company over the line of the Appellant and originating in Europe, for the services performed by the said Sheldon & Company for the Lehigh Valley Railroad Company mentioned in Paragraph "V" hereof and more specifically and fully set forth
in the Appellant's answer to the petition of the 147
Appellee in the Court below.

VII. The Court erred in failing to hold and decide that the Lehigh Valley Railroad Company was justified in paying the said George W. Sheldon & Company a certain fixed salary for the services performed by George W. Sheldon & Company for the Appellant mentioned in paragraph "V" hereof and more specifically and fully set forth in the Ap-

148 pellant's answer to the petition of the Appellee in the Court below.

VIII. The Court erred in failing to hold and decide that the payment of commissions and a salary by the Lehigh Valley Railroad Company to George W. Sheldon & Company for the services hereinbefore referred to performed by the said Sheldon & Company were justified in the absence of proof on the part of the Government that the said George W. Sheldon & Company refunded or remitted in any manner or by any device any portion of the commissions and salary paid to them
149 by the Lehigh Valley Railroad Company to the person or persons ultimately responsible for and who paid the freight charges on any property forwarded by the said George W. Sheldon & Company over the line of the Appellant herein or its connections.

IX. The Court erred in directing and entering a decree in this action in compliance with the prayer made and contained in the petition of the Appellee in the Court below.

And the Petitioner prays that the decree aforesaid, for the errors aforesaid, and for the other errors in the record and proceedings herein may
150 be reversed and for naught held and esteemed and that it may be restored to all things that it hath lost by reason of said decree.

Dated, New York, April 28, 1915.

E. H. BOLES,
STEWART C. PRATT,
Solicitors for Appellant,
Office and Post Office Address,
143 Liberty Street,
Borough of Manhattan,
City of New York.

UNITED STATES DISTRICT COURT, 151

SOUTHERN DISTRICT OF NEW YORK.

LEHIGH VALLEY RAILROAD COMPANY, Appellant, vs. UNITED STATES OF AMERICA, Appellee.	In Equity. E-11-375.

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By the Honorable Learned Hand, one of the justices of the District Court of the United States for the Southern District of New York, in the Second Circuit, to the United States of America, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, to be holden at the city of Washington, in the District of Columbia, on the 28th day of May, 1915, pursuant to an appeal filed in the clerk's office of the District Court of the United States for the Southern District of New York, from a judgment and decree made on or about April 6, 1915, in a cer- 153
tain proceeding wherein the United States of America is the petitioner and the Lehigh Valley Railroad Company is respondent, and wherein the Lehigh Valley Railroad Company is the appellant and you are the appellee, to show cause, if any there be, why the judgment and decree in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhat-

154 tan, in the city of New York, in the district and circuit above named, this 28th day of April, in the year of our Lord one thousand nine hundred and fifteen, and of the Independence of the United States the one hundred and thirty-ninth.

LEARNED HAND,
Judge of the District Court of the United States, for the Southern District of New York, in the Second Circuit.

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155 UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LEHIGH VALLEY RAILROAD COMPANY, Appellant, vs. UNITED STATES OF AMERICA, Appellee.	In Equity. E-11-375.

156

Hon. ALEXANDER GILCHRIST, JR.,
Clerk United States District Court,
Southern District of New York:

You will please take notice that the portions of the record to be incorporated into the transcript on the appeal of the appellant herein, represented by the undersigned solicitors, are as follows:

A. Subpœna.

1. Petition of the United States.

2. Answer of the respondent. 157

3. Stipulation as to the facts set forth in the petition and answer made upon the record of the court at the trial of the above mentioned cause.

4. Petitioner's notice of motion for judgment and the relief prayed for in the petitioner's bill upon the bill and answer filed herein.

5. Opinion and decision of the District Court written by Hough, *D. J.*

6. Decree.

7. Final Record.

8. Petition for allowance of appeal.

9. Assignments of error. 158

10. Allowance of appeal.

11. Citation on appeal.

12. Stipulation as to Record.

Dated, New York, April 28, 1915.

E. H. BOLES,
STEWART C. PRATT,
Solicitors for the Appellant,
Office & Post Office Address,
143 Liberty Street,
Borough of Manhattan,
City of New York. 159

It is hereby stipulated that the foregoing papers shall constitute the record on appeal herein, and that a bond on appeal is hereby waived.

E. H. BOLES,
STEWART C. PRATT,
Solicitors for Appellant.
H. SNOWDEN MARSHALL,
U. S. Attorney, Solicitor for Appellee.

160 Upon reading and filing the foregoing stipulation it is ordered that the clerk certify the record in accordance therewith.

Dated April 28th, 1915.

LEARNED HAND
U. S. D. J.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

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161 LEHIGH VALLEY RAILROAD COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA
Appellee.

IT IS HEREBY STIPULATED AND AGREED, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

162 Dated, New York April 29, 1915.

E. H. BOLES,
STEWART C. PRATT,
Attorneys for Appellant.
H. SNOWDEN MARSHALL
Attorney for Appellee.

UNITED STATES OF AMERICA, Southern District of New York, } ss.: 163

LEHIGH VALLEY RAILROAD COMPANY
Appellant

vs.

UNITED STATES OF AMERICA
Appellee

I, ALEXANDER GILCHRIST, JR., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties. 164

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this ~~29th~~ 30th day of ~~April~~ May in the year of our Lord one thousand nine hundred and fifteen and of the Independence of the said United States the one hundred and thirty-ninth. 165

ALEX. GILCHRIST, JR.,
Clerk.

[SEALED.]

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IN THE

Supreme Court of the United States.

LEHIGH VALLEY RAILROAD COMPANY,
Appellant,

vs.

THE UNITED STATES,
Appellee.

No. 124.
October Term,
1916.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Statement of the Case.

This is an appeal from a decree of the United States District Court for the Southern District of New York, awarding an injunction to the Appellee, the United States.

The decree was entered without the hearing of evidence on motion of the United States that the injunction be granted upon the Bill, Answer and a stipulation of certain facts. This motion was equivalent to a demurrer to the defense, and, as there is no inconsistency between the Stipulation and Answer (the Stipulation being merely sup-

plementary and explanatory), the *basis of fact* upon which the decision of the court below was rendered, consists of *all averments of the Stipulation and Answer,* and *such averments only of the bill* as are *consistent with the Stipulation and Answer.*

The one issue presented for decision was whether an agreement, pursuant to which certain payments were made by Appellant to G. W. Sheldon & Co., was, as claimed by the United States, an agreement for unlawful rebates of portions of freight rates paid by Sheldon to the Appellant, or, as claimed by the Appellant, proper compensation for services rendered by G. W. Sheldon & Co. to Appellant.

G. W. Sheldon & Co. was a forwarder, custom-house broker and on behalf of Appellant acted as foreign import agent. As forwarder it was accustomed to bring imported goods from various points of origin in Europe and other non-adjacent foreign countries to points of destination within the United States, and incidentally to perform various other services necessitated by customs regulations, etc. When any such import freight was destined to inland points within the United States it was customarily shipped on the domestic railroads under bills of lading in which Sheldon & Co. was named as consignor and consignee. On all such shipments made over its line, the Appellant has collected and received from Sheldon & Co. the lawfully published rates for the transportation of the goods in question.

G. W. Sheldon & Co. had acted for the Lehigh Valley Railroad Company as import freight agent for more than twenty-five years prior to the beginning of this suit. In this capacity it solicited and procured shipment over Appellant's lines of traffic originating in non-adjacent countries. It main-

tained offices located in various cities in Europe, advertised the Appellant, and itself as the import freight agent of the Appellant, and disseminated information as to the freight rates and facilities of the Appellant. Five-sixths of the import traffic which Sheldon forwarded over Appellant's lines was contracted for within the United States and the remaining one-sixth in the European offices of Sheldon. Sheldon's employes systematically and diligently solicited and sought to procure freight traffic destined to interior points in the United States to be shipped over the Appellant's lines and it constantly performed many services on behalf of Appellant in connection with the solicitation of import business. These services Appellant could not perform for itself without a highly organized corps of employes in Europe, whose duty it would be to attend exclusively to the solicitation of such freight traffic and the expense of maintaining such an organization would be absolutely prohibitive.

In its inception the import freight business procured by Appellant through Sheldon was comparatively small, but it has greatly increased in volume so that during the year 1910 alone it amounted to 54,232,076 pounds with a resultant revenue to Appellant of One Hundred Eighty-five Thousand, Eight Hundred Eighty-three Dollars, Five Cents ($185,883.05). If the arrangement under which Sheldon & Co. acts as import freight agent for Appellant is found to be illegal, Appellant, not having the facilities to attend to this class of business itself, will be required to retire at a great loss to itself from the field of European solicitation.

The value of the services thus performed for Appellant by Sheldon could, from their nature, be measured only by the amount of freight which Sheldon caused to be sent over Appellant's line. Accordingly, it was agreed that Sheldon & Co. should be compensated for its services by receiving an amount equal to ten per cent. of all freight charges collected on traffic rated from first to third class, inclusive, solicited on behalf of Appellant and transported over Appellant's line, and five per cent. of freight charges rates from fourth to sixth class, so solicited and carried.

In addition, Sheldon & Co. was entitled to an annual salary of Five Thousand ($5,000.00) Dollars to reimburse it for shipments of commodity freight so solicited and carried, which had no official rating, and to assure it a fixed compensation for multitudinous other duties performed by it for Appellant.

The decree adjudges that "the certain agreements or understandings existing between the respondent, Lehigh Valley Railroad Company, and George W. Sheldon & Company, whereby said Lehigh Valley Railroad Company has agreed to pay back, return, refund and remit to George W. Sheldon & Company a portion of the rates and charges provided for in the lawfully published and filed tariffs of said Lehigh Valley Railroad Company * * * are unlawful as being in violation of" the Interstate Commerce Acts, and then proceeds, first, to restrain the Lehigh Valley Railroad Company from paying Sheldon "any and all sums of money, whether the same be in the form of commissions, salaries or otherwise * * * under and pursuant to the contracts and understandings herein-

before adjudged and decreed to be unlawful", and, second, restrains the Appellant from "further execution or recognition of said contracts and agreements hereinbefore adjudged and decreed to be unlawful, in any such manner, method or device as will permit and enable property heretofore and hereafter shipped as interstate commerce by George W. Sheldon & Company over and upon the line and route of transportation of Lehigh Valley Railroad Company to be transported at rates and charges less than those named in the lawfully published and filed tariffs of said Lehigh Valley Railroad Company."

Specifications of Error.

Appellant submits that the decree is erroneous in the following respects:

1. The facts of the record do not warrant any conclusion that any agreement existed between Appellant and George W. Sheldon & Company for the payment of rebates, or that any rebates were paid either directly or indirectly by Appellant to Sheldon & Co. The prayer of the bill should, therefore, have been denied.

2. Upon the facts presented by the record the Court below should have found that the agreement between Appellant and Sheldon & Co. and the payments made pursuant thereto were lawful.

3. The finding of the decree that "certain agreements * * * whereby said Lehigh Valley Railroad Company has agreed to pay back, return, refund and remit to George W. Sheldon & Company

a portion of" freight rates previously paid by Sheldon & Co., to Appellant, "are unlawful", does not determine any issue in the case, and is irrelevant.

4. Clause "First" of the injunction is improper in that it purports to restrain Appellant from making payments to Sheldon & Co. under agreements "hereinbefore adjudged and decreed to be unlawful"—that is, under agreements to "pay back, return, refund and remit" a portion of previously collected freight rates. There is no finding that any agreements between Appellant and Sheldon, the existence of which is established by the record, are agreements of that character, and no facts in the record would sustain any such finding.

5. Clause "Second" of the injunction is improper in that it leaves it to be determined by Appellant at its peril whether any particular payments which it may make to Sheldon & Co. will have the effect of causing shipments of the latter to be transported over Appellant's lines at rates less than those made in the lawfully published and filed tariffs of the Appellant.

ARGUMENT.

I.

The agreement between Appellant and Sheldon & Co. required Sheldon & Co. to perform valuable services for Appellant, and Appellant suitably to compensate Sheldon & Co. for these services. Neither the performance of the services nor the payment of the compensation are forbidden by the Interstate Commerce Laws.

Any payment by a carrier to a shipper to compensate the shipper *for routing its own shipment* via the carrier's line *is a rebate;* a *reasonable payment* by a carrier to a solicitor to compensate it *for inducing third persons to permit shipments to go* via the carrier's line is a legitimate compensation.

Where the person receiving the payment has the power to determine the routing, and is paid merely for exercising that power in favor of the carrier, the payment may be said to violate the Interstate Commerce Laws. Where, however, third persons have that power, the carrier may properly pay an intermediary for soliciting and procuring them to exercise it in favor of the carrier. The record establishes the fact that the payments by Appellant to Sheldon & Co. fall in the latter class.

A. The facts.

1. *No question of fact* was before the Court below for decision. The basis of fact, upon which the decree must stand or fall, consists of, first, a stipulation of certain details; second, all averments of the Answer; and third, such averments *only* of the Bill as are consistent with the Stipulation and Answer.

(*a*) The Stipulation is brief, covers only a few matters, all purely incidental, and is intended to explain and show the application of certain averments of the Answer. It does not contradict the Answer in any particular.

(*b*) By moving for the entry of a decree "upon the Bill, Answer and the Stipulation of Facts", Appellee took the position that, conceding the *truth of all averments of the defense,* the United States was, nevertheless, *as a matter of law,* entitled to relief. The motion amounted *to a demurrer to the defense.*

Leeds v. *Marine Ins. Co.,* 15 U. S. (2 Wheat.) 380;
City of Wichita v. *Wichita Water Co.,* 222 Fed. 789;
Groel v. *United Electric Co.,* 71 Atl. (N. J.) 1061;
Goodwin v. *Phifer,* 41 So. (Fla.) 597;
Straus v. *Putta,* 265 Ill. 57;
1 Ency. Pl. & Pr. "Answers in Equity Pleading", 924.

2. As we believe the Court below erred by misapprehending or ignoring the facts of the record

upon which it was called to pass, we think it well to take up these facts in detail.

(*a*) The Answer avers that among the services performed by Sheldon & Co. for Appellant are (Trans., pp. 27, 28):

The solicitation for shipment over Appellant's line of traffic originating in Europe and destined to interior points within the United States.

The devotion of a considerable portion of the business activities of Sheldon & Co. to such solicitation.

The employment of Sheldon & Co.'s European offices in systematically and diligently seeking to influence the routing of freight destined to the interior points in the United States over the lines of this company.

Keeping at the European offices of Sheldon & Co. the Appellant's tariffs for the convenience of European shippers.

Advertising Sheldon & Co. as import freight agents of the Appellant.

G. W. Sheldon & Co. are constantly called upon by the Appellant to perform many allied and incidental services in connection with the solicitation of import business.

The Bill itself described numerous activities of Sheldon & Co. which, although the connection is not always obvious, also constitute part of the consideration for the agreed payments by Appellant to Sheldon & Co., as will be later pointed out; among these activities are the following (Trans., pp. 7, 8):

The maintenance of offices in Chicago, New York, Liverpool, London, Paris, and elsewhere.

The performance of various services required by

customs rules and other regulations attendant upon such importations.

Advancing invoice value of importations to the seller abroad for account of the importer.

Drayage of importations from foreign factories to foreign inland stations, and shipment of the goods to foreign ports of transshipment.

Transfer of goods to steamships bound for New York.

Getting the imported goods from the docks of the ocean carrier to Appellant's terminal and putting them on board Appellant's cars.

Advancing domestic duties upon importation of the goods, draying them from railroad stations at point of destination to the warehouse or store of the importer.

Placing insurance on imported goods, advancing insurance premiums and foreign taxes, attending to all other services and making all other payments necessary for the movement of goods from point of origin to point of destination.

It also appears from the Bill itself that, whenever it is permitted to do so, Sheldon & Co. routes such importations over Appellant's line.

(*b*) Under the general averments that the solicitation of import traffic for Appellant represents a considerable portion of the business activities of Sheldon & Co. (Trans., pp. 25, 26), Appellant would have been entitled to prove other services and considerations not specifically described in the Answer, which justify the agreement to compensate Sheldon & Co., namely:

(1) Import freight traffic cannot successfully be "solicited" or "procured" for a domestic railroad

unless the solicitor is in the position to assure the shipper that the shipment will promptly be transferred to each of the successive carriers whose services are required, and will not be interrupted by lack of compliance with any export or import regulations. Neither the importer, the exporter, the foreign or domestic rail carriers, nor the ocean carrier are qualified to perform these services. The import agent, however, has the necessary facilities. It carts the shipment from factory to foreign freight station, loads it on cars and transfers it from the foreign rail terminal to the hold of the ocean carrier.

While the ocean carrier is supposed to load goods delivered at its dock, in practice the shipment will be indefinitely delayed and may lie on the dock during the departure of several boats unless some other agency puts it on board. Without the services of the import agent, the shipment, upon its arrival in New York, would be warehoused, with expense and delay to the importer. The expert services of the import agent are also required to assist the exporter to comply with the export regulations, to prepare the numerous manifests, bills of lading and other shipping documents, and arrange for insurance. Owing to its inability to perform these services, Appellant cannot itself successfully solicit or procure import freight business. Their performance and the provision of the organization and facilities which enable their performance is a vital part of the service of solicitation which Sheldon & Co. renders and Appellant pays for.

(2) Sheldon & Co. also advertised Appellant and disseminated information as to its rates and facilities for handling traffic. This not only assists in

the immediate solicitation of traffic, but builds up a valuable good will.

(3) As the result of Sheldon & Co.'s advertising, a certain amount of traffic is constantly received at the steamship dock in New York, consigned direct to Appellant for shipment to inland points. Appellant has not the facilities required to transfer such shipments from the dock to its own terminals and could not procure this character of traffic without providing the requisite facilities at considerable expense were it not able to turn over the ocean bills of lading for all such shipments to Sheldon & Co. and have Sheldon & Co. transfer the freight and arrange for compliance with all customs requirements.

(4) Sheldon & Co. does not derive from all sources more than reasonable compensation for the services rendered, and, should Appellant be denied the right to compensate Sheldon & Co. for services peculiarly for Appellant's benefit, the result, at best, would be that a serious additional burden would be thrown upon the importer, resulting in a discouragement and perhaps a decrease of import business.

(*c*) The record clearly establishes that, under the arrangement in question, the *service* Sheldon & Co. was required to perform for Appellant consisted in influencing and causing third persons to consent to route their shipments of import freight via Appellant's line, and that to qualify to perform this service effectively Sheldon & Co. was obliged to, and did, employ a large, complicated and efficient organization and expensive facilities in attending to numerous necessary details in con-

nection with the forwarding of freight shipments, without which the solicitation would have been fruitless.

While it is difficult to gather from the decree or opinion of the Court below the *ratio decidindi*, it appears from the opinion (Trans., pp. 36-37) that the Court assumed that Sheldon & Co. was being compensated for the mere act of exercising its own volition to route its own shipments via Appellant's line. This assumption, obviously, is not supported by the facts which should have formed the basis of a decision.

B. Even if Sheldon & Co. is to be treated for all purposes as "shipper" of the traffic which is used as a measure for computing compensation, this does not disqualify it to solicit freight for Appellant, nor to be compensated therefor.

Interstate Commerce Comm. v. *Diffenbaugh*, 222 U. S. 42.

United States v. *Baltimore & Ohio R. R. Co.*, 231 U. S. 274.

Delaware, L. & W. Ry. Co. v. *Rutter*, 147 Fed. Rep. (N. Y. C. C. A.) 51; *Certiorari* denied, 203 U. S. 588.

Mitchell Coal Co. v. *Penna. R. Co.*, 230 U. S. 247.

Beale and Wyman, "Carriers", 2d. ed., Sec. 745.

Interstate Commerce Act, Sec. 15, as amended.

1. It is difficult to understand how such a question ever arose. It is manifestly to the interest of the public, as well as the railroad, that the railroad be permitted to secure the facilities, supplies and

services which it needs wherever it can get them to the best advantage. To hold that all shippers are disqualified from dealing with the railroad except in the capacity of shippers would be preposterous, and in cases where the services rendered by a shipper were much more directly connected with the public duties of the carrier in transporting the shipper's goods and where the *opportunities* for using these services as a cloak for unjust discrimination and the payment of rebates are greater than in the present case, this Court has consistently held that, in the absence of proof that the payments made by the carrier were in reality rebates and not honestly intended as compensation for services rendered and facilities furnished, the practice cannot be condemned.

In *Interstate Commerce Commission* v. *Diffenbaugh, supra,* it appeared that it was a commercial necessity of the Union Pacific Railroad that its cars be unloaded at its eastern termini, and this required the establishing of elevators at these points. The carrier made a contract with Peavey, who was himself a large shipper of grain, under which he built certain elevators and, without increasing the freight rate, the carrier paid him a fixed rate for elevating all shipments of grain, *including his own grain.* The payment for his own grain was deducted from the regular freight charges. Objection was made to this practice on the ground that it constituted a rebate, and the Interstate Commerce Commission ruled that it was not a rebate, but was compensation for services properly rendered. As it appeared, however, that this practice made it possible for Peavey to perform other services for his own grain in the way of treatment, cleaning, clipping and mixing, which it did not perform for other shippers,

and also afforded opportunities for fraud, with a view to prevent the abuse of such practices the Commission brought the entire matter to the attention of Congress. As a result, the Interstate Commerce Act was amended to make grain elevation and similar services part of "transportation" and the services included therein under the Interstate Commerce Act, and to forbid the payment by the carrier to shippers performing these services on their own shipments anything more than a reasonable compensation.

After the amendment the Commission changed its position and finally ruled that the railroad must not pay Peavey anything for his services in elevating his own grain in transit. The ruling was *not* made on the ground that a *shipper is disqualified by its relations with the carrier* to perform services in connection with the shipment of its own goods and receive compensation therefor, but on the ground that, under the peculiar facts of the case, the elevating of grain afforded Peavey a discriminatory advantage over other shippers. This ruling was set aside upon appeal to the Federal Courts and the decision was sustained in this Court. This Court said:

> "The law does not attempt to equalize fortune, opportunities or abilities. On the contrary, the Act of Congress in terms contemplates that if the Carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he shall pay for them. That is taken for granted in Sec. 15. * * * *As the carrier is required to furnish this part of the transportation upon request, he could not be required to do so at his own expense,* and there is nothing to prevent his hiring the instrumentality instead of owning it."

That it is proper for a shipper to perform services for a carrier and receive as compensation a sum computed upon the basis of the freight rates paid by him to the carrier is recognized in

Mitchell Coal Co. v. *Penna. R. R. Co.*, 230 U. S. 247.

The railroad allowed the shipper a tonnage rate for haulage by the shipper of its own shipments. In a suit for damages brought by a competitor of the shipper this Court states that the propriety of the allowance *depends on the question of fact* whether it is reasonable; that *prima facie* the courts must treat the allowance as reasonable, and refused to consider it a cause of illegal discrimination in the absence of a ruling by the Interstate Commerce Commission. See also

Root v. *Long Island R. Co.*, 21 N. E. Rep. (N. Y. Ct. Apps.), 403.

Rothschild v. *Wabash*, 4 S. W. Rep. (Mo.) 418.

In *United States* vs. *Baltimore & Ohio Railroad Co., supra,* the controversy was as to the propriety of an allowance to Arbuckle Brothers made on account of services which that firm rendered in connection with its own shipments of sugar. Certain railway companies, whose New York City freight lines terminate on the New Jersey shore, made an arrangement with Arbuckle Brothers under which the latter established on their own real estate the "Jay Street Terminal", a public freight receiving station, carried all out-freight delivered there to the New Jersey freight terminals by lighters.

The Federal Sugar Refining Company's refinery is located outside the lighterage district. Its cus-

tom was to have its out-freight carried by an independent Lighterage Company to the New Jersey railway terminals and shipped thence. After endeavoring, without success, to compel the railways to make it a lighterage allowance corresponding to that made to Arbuckle Brothers, it modified its practice to the extent of having its lighterage company carry from its refinery to a pier within the lighterage district; there it went through the formality of rebilling the shipments, after which the same lighter proceeded to the New Jersey freight terminals. Its demands for a lighterage allowance being again refused, it brought the matter before the Interstate Commerce Commission, which ordered the railroads either to discontinue the allowances to Arbuckle Brothers or to make corresponding lighterage allowances to the Federal Sugar Refining Company. This ruling was vacated by the Commerce Court, and its decision sustained by this Court. This Court said:

> "To say that the 'allowance' made to Arbuckle Brothers is an allowance for lightering their own sugar across the river is to only half state the case. This so-called allowance is not only for such lighterage service, but is also compensation for the use of all of the terminal properties, docks, warehouses, tracks, steam lighters, car floats and every instrumentality used under the contract. It includes the services and responsibility of Arbuckle Brothers, as agents for the several lessees using the station, and their staff of employes engaged in receiving, delivering, loading and unloading freights thus received, both incoming and outgoing. As the measure of compensation is the tonnage in and out of the station and as this compensation is paid by the several railroads maintaining the station in proportion to the tonnage which they severally handle, there is

a sense in which it is in part an allowance to Arbuckle Brothers upon their own shipments" (pp. 296-297, 231 U. S.).

The risk involved in permitting a shipper to perform part of a carrier's public service duties in the shipment of its own goods and goods of competitors, and the opportunities which this practice would afford dishonest shippers and carriers of covering rebates and unfairly discriminating against the competing shippers, are much more serious than in the instant case in which the services performed, while necessary and valuable to the railroad, are, in their nature, *private* and do not afford the shipper access to any competitor's shipments. The injunction granted by the Court below is, therefore, more clearly an unwarranted interference with legitimate business than either of the orders of the Interstate Commerce Commission which were condemned by this Court in the cases cited.

That there is nothing reprehensible in the practice of permitting a shipper to perform duties practically identical with those performed by Sheldon & Co. and to receive in compensation therefor a fixed percentage of the freight rates (as a measure of compensation) collected on traffic in the procuring and handling of which it participates, is made very clear by a decision by the Circuit Court of Appeals in a case originating in New York, *to which this Court has denied a petition of certiorari.*

Del., L. & W. Ry. Co. vs. *Rutter,* 147 Fed. Rep. 51.

The carrier made a contract with one Westcott, under which he promised to promote and handle the carrier's milk shipping business, send messen-

gers on the cars to look after the milk, collect rates and also to act as the representatives of the owners of the milk. It does not appear directly (nor is it material) in whose name the milk was consigned, but it is a fair inference that Westcott's name was used. *As compensation, the railroads agreed to pay Westcott twenty per cent. of the collected transportation charges.* In defense of a suit to collect payments due according to the terms of the contract, the railroad claimed that the agreed payments to Westcott constituted an undue preference in violation of the Interstate Commerce Act. In denying this defense the Court said:

> "The privileges accorded Westcott were only those which were incident to the anomalous relations existing between him and the defendant, created by the contract. It is quite inconceivable that there were or could have been any shippers of milk who would have been willing to undertake his duties. In consideration of his assumption of peculiar obligations and hazards, the defendant gave him the exceptional privileges appertaining to his relation as a manager of the traffic; this was not an undue and unreasonable preference" (p. 63).

C. Decisions as to the conditions under which forwarding agents are to be treated as "shippers" are not relevant to the present controversy.

It appears from the record that Sheldon & Co. acts as consignee of a part, at least, of these shipments. In *Interstate Commerce Commission* vs. *Del., L. & W. R. Co.,* 220 U. S. 235, this Court held that a railroad cannot deny the carload rate reduction to a forwarding agent, overruling the

railroad's claim of right to go back of the immediate shipper and inquire into the ultimate ownership of the goods. The decision is not based upon any technical definition of the term "shipper", however. Carload rates are justified by the fact that they make at least certain economies which are impossible for less than carload shippers, and every economy secured in connection with a carload shipment of goods all owned by a single shipper is secured in connection with carload shipments in the forwarding business.

In *Great Northern R. R.* vs. *O'Connor,* 222 U. S. 508, the owner of goods entrusted them to a forwarding agent, who combined them with other goods in a carload shipment which he classified and valued as goods not exceeding in value $10.00 per cwt. The goods were destroyed and the *owner* sued the carrier, claiming that he was not bound by the valuation established by the forwarder. It is obvious that on principles of agency this contention was not well founded, and this Court so ruled. The Court states, moreover, that for purposes of classification and valuation the forwarder is to be regarded as the shipper.

Neither of these cases conflict with the established principle that a shipper may with propriety perform services for the carrier and receive appropriate compensation therefor. Nor do these decisions require this Court to assume, contrary to the averments of the record, that Sheldon & Co. was the *owner* of the shipments for the solicitation of which Appellant claims the right to compensate Sheldon & Co., or that the compensation is paid to induce Sheldon & Co. to exercise its own volition as to routing, and not to compensate it for its services in inducing the owners to permit the shipments to be made via Appellant's lines.

D. Questions as to possible conflict between Sheldon & Co.'s relation to Appellant and the same Company's relation to shippers, are foreign to the present issue.

The contention on behalf of the United States in the Court below consisted principally of argument that in consequence of the principles of the Law of Agency the performance of the agreement between Sheldon & Co. and Appellant should be enjoined. The connection between the premises and conclusion is difficult to discover. Apparently the argument, reduced to its lowest terms, is as follows:

> "The arrangement between Sheldon & Co. and the Lehigh Valley Railroad Company violates the principles of agency.
> "Therefore, this arrangement violates the Interstate Commerce Laws."

1. Sheldon & Co. is not in the *technical legal sense* the agent of the Lehigh Valley Railroad Company, for it has no power to make any contracts in its name. In a *legitimate business* sense, it is Appellant's "foreign import agent". Its legal status is that of an independent contractor, employed to perform certain specified services. Neither is Sheldon & Co. in the technical sense the agent of the importers and exporters whose goods it handles. It is an independent contractor employed by them to perform certain specified services and it makes all contracts requisite to carry out the employment in its own name and not in the name of its employers. The truth of these propositions is too clear from the record to require any extended discussion

or citation of authorities. The record, moreover, fails to disclose any conflict in the two kinds of employment.

2. Whatever standing this action has is derived from the Interstate Commerce Act and its scope is necessarily limited to the enforcement of the provisions of that Act. The Court below had no jurisdiction to enjoin the arrangement between Appellant and Sheldon & Co. on the ground that it was not warranted under the principles of the Law of Agency.

E. Summary.

In attempting to show that the arrangement in question is not improper, we are confronted with the usual difficulties of proving a negative. We have, however, answered all objections which we are able to find in the decree and opinion of the Court below, and the contentions made in behalf of the United States below.

1. The apparent assumption of the Court below that it is called upon to decide whether or not a shipper may lawfully accept a commission upon freight charges paid by it solely in consideration of its willingness to route the shipments in question via the paying carrier, has been shown not to be the issue and to conflict with the facts of the record.

2. The intimation of the Court below (Trans., p. 36), that, while the carrier may, as a rule, pay commissions to solicitors, it cannot employ a shipper as solicitor upon a commission basis, is refuted by

the principle approved by this Court that a carrier has the right to employ shippers to perform legitimate services for it and compute their compensation on the basis of freight revenue.

3. Questions as to the existence and propriety of a technical agency relation between Appellant and Sheldon & Co., and possible conflict of duties to principals, have no application, as this proceeding is limited in scope to the enforcement of the Interstate Commerce Laws.

4. In this case the Court is not called on to pass on a device adopted after the enactment of the Interstate Commerce Laws, and which might have been originated to cover an evasion of these laws, but an arrangement which has existed for more than twenty-five years, and from which the road has enormously profited, with no corresponding detriment to the public or to any competitors.

II.

The finding of the decree and clauses "First" and "Second" of the injunction are improper.

These are plain errors which should be noticed without assignment. Moreover, there is no requirement, statutory or by rule of this Court, that errors not assigned cannot be considered in an appeal such as this, perfected under section 3 of the Elkins Act. However, in our opinion, Assignment IX (Trans., p. 50) covers the points.

A. The only finding in the decree, appearing in its first paragraph, is predicated on facts, for the assumption of which the record affords no justification.

The Court below finds to be unlawful, as a violation of the Interstate Commerce Laws, "certain agreements or understandings existing between the Respondent, Lehigh Valley Railroad Company, and George W. Sheldon & Co., whereby said Lehigh Valley Railroad Company *has agreed to pay back, return, refund and remit* to George W. Sheldon & Co. a portion of" lawful freight charges previously paid by Sheldon & Co.

As our analysis of the record has already shown, the real agreement of Appellant is to pay commissions for soliciting and procuring freight traffic, and there is nothing in the record which warrants the assumption that Appellant "has agreed to pay back, return, refund or remit" any freight charges.

B. Clause "First" of the injunction proper is open to the objections that it is unnecessarily general and uncertain, and does not sufficiently apprise Appellant what it is forbidden to do.

1. This clause restrains Appellant from paying Sheldon & Co. anything "under and pursuant to the contracts and understandings hereinbefore adjudged and decreed to be unlawful". As we have already noted, the decree finds to be unlawful certain agreements to return portions of freight rates, and it does not appear, as a matter of fact, that any agreements of this nature between Appellant and Sheldon & Co. exist. If, therefore, Appellant

should continue the practices, *the existence of which actually is established* by the record and *as to which the decree contains no finding,* Appellant might or might not be guilty of contempt, depending on what decision the Court below should make in the contempt proceedings of the very question which it ought to have decided by the present decree, namely, whether or not the commissions in question were in reality rebates.

2. It is a prime requisite of an injunction order that it must in itself contain sufficient statements definitely to apprise the defendant of what he is prohibited from doing and not leave this question to be determined by the unsatisfactory means of contempt proceedings, in which the evidence is often presented by affidavit.

Collins v. *Wayne Iron Works,* 76 Atl. Rep. (Pa.) 24;

Sullivan v. *Judah,* 4 Paige (Ch. N. Y.) 444;

Ballantine v. *Webb,* 47 N. W. Rep. (Mich.) 485;

Regan v. *Sorenson,* 100 N. W. Rep. (N. D.) 1095.

Nor is the decree cured by the opinion (particularly in a case such as this, in which it is difficult to determine from the opinion itself to what state of facts the Court has reference).

Regan v. *Sorenson,* 100 N. W. Rep. (N. D.) 1095.

C. Clause "Second" is open to the further objection that in effect it merely orders Appellant to comply with the statutory provisions as to collection of scheduled freight rates, without furnishing any standard by which Sheldon & Co. can determine what constitutes obedience to these provisions.

This clause restrains Appellant from transporting Sheldon & Co.'s shipments "at rates and charges less than those named in the lawfully published and filed tariffs of said Lehigh Valley Railroad Company". An injunction which merely commands the defendant in general terms to obey the law has failed utterly of the purposes for which injunctions are intended.

Swift & Co. v. *United States,* 196 U. S. 375;

Lone Star Salt Co. v. *Blount,* 107 S. W. (Tex. Civ. App.) 1163;

Hearst v. *N. Y. C. & H. R. R. Co.,* 148 N. Y. Supp. (App. Div.) 586, 590.

It is therefore submitted that the decree of the Court below cannot be justified, either upon any technical and narrow construction of the provisions of the Interstate Commerce Laws or upon grounds of public policy. Its effect is seriously to curtail legitimate business, to the detriment both of Appellant and G. W. Sheldon & Co., and without any compensating benefit to Sheldon & Co.'s competi-

tors. It is, moreover, inimical to public interests, since it is obvious that an important function of the import agent is to facilitate and increase foreign commerce, and to attempt an arbitrary readjustment of its sources of compensation will be to throw unjust burdens on some of the various factors which contribute thereto, and, as a result, to reduce its efficiency.

The decree of the Court below should, therefore, be reversed.

All of which is respectfully submitted.

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In the Supreme Court of the United States.

OCTOBER TERM, 1916.

No. 124.

LEHIGH VALLEY RAILROAD COMPANY, APPELLANT,

v.

THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a direct appeal from a decree of the United States District Court for the Southern District of New York enjoining the Lehigh Valley Railroad Company from making certain payments to George W. Sheldon & Company, freight forwarders, in consideration for traffic.

The petition seeking the injunction was filed by the United States pursuant to section 3 of the Act to Further Regulate Commerce (the Elkins Act), 32 Stat., 847, 848, c. 708, which authorizes proceedings in equity

to prevent common carriers from departing from their published rates or from committing any discrimination forbidden by law.

A direct appeal to this Court is authorized by section 2 of the Commerce Court Act, 36 Stat., 539, 542, c. 309, as amended by the Act Abolishing the Commerce Court, 38 Stat., 219, c. 32; and also by section 2 of the so-called Expediting Act, 32 Stat., 823, c. 544, as amended by section 291 of the Judicial Code, 36 Stat., 1087, 1167, c. 231.

The case was submitted on bill, answer and a stipulation of facts. The essential facts are few:

The Lehigh Valley Railroad Company is a common carrier subject to the Act to Regulate Commerce. It operates a railroad from New York to Buffalo, there connecting with the line of the New York, Chicago & St. Louis Railroad Company and forming a through line from New York to Chicago with joint through rates. (Rec., 4–5, 21.)

Sheldon & Company are forwarders and custom-house brokers, with offices in New York, Chicago and a number of European cities. (Rec., 6, 21, 32.) In the course of their business as forwarders they make contracts with Chicago importers to take up at the points of origin and deliver at Chicago, for a specified compensation, goods purchased abroad. (Rec., 6–7, 21.) In some of these contracts the carriers which are to transport the goods are named. Where that is not done Sheldon & Company direct the routing. (Rec., 8, 9, 21.)

Sheldon & Company then make contracts in their own right and name with various carriers for the transportation of the goods through each successive stage from the points of origin abroad to the points of destination in this country. (Rec., 8–9, 21.) Particularly, they enter into such contracts with the Lehigh Valley Railroad Company for the transportation of the goods from New York, the port of entry, to Chicago. (Rec., 8, 9, 21.)

In all cases Sheldon & Company receive the goods from the sellers abroad and deliver them to the various carriers. (Rec., 6, 21.) At each stage of the transportation they make the contract of affreightment in their own right and name and are both consignors and consignees. (Rec., 8, 9, 21, 31–32.)

In some cases they advance to the sellers abroad the invoice value of the goods for the account of the importers, and also foreign taxes. (Rec., 6, 7, 21.) In some cases, also, they insure the goods while en route. (Rec., 7, 21.)

In addition to their business as forwarders, just described, Sheldon & Company are employed by the Lehigh Valley Railroad Company to "solicit" the shipment over its lines of the goods handled by them as forwarders and destined to the interior of the United States. (Rec., 21, 25, 31–32.)

Pursuant to that employment, a large part of these goods arriving in New York and destined to Chicago for a long time have been shipped by Sheldon & Company over the lines of the Lehigh Valley Railroad

Company, at the published rates, under an agreement or understanding that they shall receive back from the carrier payments as follows: In respect of shipments of goods rated from first to third class in the official classification (published and filed with the Interstate Commerce Commission), 10 per cent of the regular freight charges; in respect of shipments rated from fourth to sixth class, 5 per cent of the regular freight charges; in respect of shipments of commodity freight not rated in the official classification, an annual salary. (Rec., 10, 14, 21, 23, 27.)

No such payments are made by the Lehigh Valley Railroad Company to other persons engaged in the business of forwarder in competition with Sheldon & Company. (Rec., 10–11, 22.)

The petition charges that these payments by the Lehigh Valley Railroad Company to Sheldon & Company in consideration for the shipment over its lines of goods in their possession as forwarders constitute rebates, a departure from the carrier's regular rates, and undue discrimination, in violation of Sections 2, 3 and 6 of the Act to Regulate Commerce as amended (24 Stat., 379, c. 104; 34 Stat., 586, c. 3591, sec. 2; Comp. Stat. 1913, secs. 8564, 8565, 8569), and of section 1 of the Elkins Act as amended (32 Stat., 849, c. 708; 34 Stat., 587, c. 3591, sec. 2; Comp. Stat. 1913, sec. 8597).

The defense is that the payments were compensation to Sheldon & Company for "soliciting" the shipment of the goods over the lines of the Lehigh Valley Railroad Company and for services incidental thereto.

The District Court sustained the petition and entered a decree enjoining further payments of the sort. (Rec., 41.)

THE ARGUMENT.

I.

The Act to Regulate Commerce, section 6 as amended, after requiring the rates of carriers subject to the act to be filed with the Interstate Commerce Commission and published, makes it unlawful for any such carrier to "charge or demand or collect or receive a greater or less or different compensation * * * than the rates, fares, and charges which are specified in the tariff filed and in effect at the time"; or to "refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified." (34 Stat., 587.)

Another section makes it unlawful for any such carrier "directly or indirectly, by any special rate, rebate, drawback, or other device, [to] charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, * * * than it charges, demands, collects, or receives from any other person or persons * * * under substantially similar circumstances and conditions." (Sec. 2, 24 Stat., 379–380.)

Still another section makes it unlawful for any such carrier "to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, * * * in any

respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." (Sec. 3, 24 Stat., 380.)

Section 1 of the Elkins Act makes it unlawful "for any person, persons, or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce * * * whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed * * * or whereby any other advantage is given or discrimination is practiced." This section also provides that the rate filed with the Interstate Commerce Commission "shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act." (32 Stat., 847–848; 34 Stat., 587–588.)

Referring to these provisions, this Court said in the *New Haven Case*, 200 U. S. 361, 391:

> It can not be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination. To this extent and for these purposes

> the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve.

Payments by a carrier to a shipper in consideration for traffic constitute rebates and undue preferences within the very letter of these statutes.

II

It follows, therefore, as stated by the District Court (Rec., p. 39), that this whole case turns upon the question whether in law Sheldon & Company are to be treated as the shippers of the goods for the privilege of transporting which the Lehigh Valley Railroad Company paid them the sums in controversy. The District Court held that they are to be so treated, saying (Rec., pp. 35–36):

> The relation of shipper and carrier is formal, and must respond to certain well-known tests. It has no relation to ownership. A shipper is one who ships even when he has no right so to do; but a forwarder is one whose business it is to ship; and I am unable to see how it can be doubted (and I do not think it has been denied) that when Sheldon & Company send goods over the Lehigh Valley road in their own name they are in a position to insure, to demand and receive delivery, and to recover for breaches of the contract of carriage entered into between themselves and the carrier;—these are the indicia of the formal and legal relation entered into by the issuance of a shipping receipt or bill of lading.

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> I have no doubt that Sheldon & Company are to be regarded as shippers for every purpose, and consider this conclusion to be supported by *Great Northern R. R. Co.* vs. *O'Connor*, 232 U. S. 508.

No other conclusion was admissible. Sheldon & Company held possession of the goods as forwarders—a business defined as follows in *Interstate Commerce Commission* v. *Delaware, Lackawanna & Western R. R. Co.*, 220 U. S. 235, 243–244:

> The business of the forwarding agent, in so far as is material to the question involved, is to collect less-than-carload shipments from different consignors, combine such shipments into carloads, and ship the same in the name of the forwarding agent, or of the owner of one of the less-than-carload shipments, to one consignee, who may be the forwarding agent himself, another forwarding agent at the point of destination with whom he has business relations, or the owner of a part of the property transported. The consignee of the shipment, whoever he may be, receives the carload and distributes its contents to the parties for whom they are intended. The forwarding agent finds his compensation and profit in the difference between the carload and less-than-carload rates.

For a specified compensation they had undertaken to deliver the goods to the importers at Chicago. In the performance of this legal duty they made contracts with the Lehigh Valley Railroad Company, entirely independent of their contracts

with the importers, for the transportation of the goods from New York to Chicago. They were both consignors and consignees. They paid the freight. The carriers knew no one else in the transaction. In some instances they advanced to the sellers abroad the price of the goods. As the District Court held, this relation gave Sheldon & Company a special property in the goods, entitling them to insure, to demand and receive delivery, and to recover for breaches of the contract of carriage entered into between themselves and the carrier. (Rec., 36, 37.)

The very life of the business depends, indeed, upon the forwarder being treated as a shipper. If he did not possess that character he could not combine the small shipments of separate owners into carloads and claim the carload rate—the source of his livelihood.

In *Interstate Commerce Commission* v. *Delaware, Lackawanna & Western R. R. Co., supra,* and in *Great Northern Railway Co.* v. *O'Connor,* 232 U. S. 508, this Court held specifically that forwarders like Sheldon & Company are to be treated as shippers.

In the first case the question was whether a forwarder who shipped in carloads goods belonging to a number of different persons could claim the benefit of the lower carload rate to which the owners separately would not have been entitled. This Court held that the forwarder was the shipper and as such entitled to the carload rate, regardless of the ownership of the goods, saying (p. 252):

> The contention that a carrier, when goods are tendered to him for transportation, can

> make the mere ownership of the goods the test of the duty to carry, or what is equivalent, may discriminate in fixing the charge for carriage, not upon any difference inhering in the goods or in the cost of the service rendered in transporting them, but upon the mere circumstance that the shipper is or is not the real owner of the goods, is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the rights of shippers, as to demonstrate the unsoundness of the proposition by its mere statement.

In the second case it was held that the forwarder is the shipper for the purpose of classifying and valuing the shipment, even though acting in this regard without express authority from the actual owner, the Court saying (p. 514):

> * * * the Railroad Company was obliged to treat the forwarder as shipper, even though thereby the carrier lost the benefit of the higher rate which would have been applicable to separate and small shipments. This was the ruling in *Int. Com. Comm.* v. *Delaware, Lackawanna & Western R. R.*, 220 U. S. 235, where it was held that the carriers were not concerned with the question of title, but must treat the forwarder as shipper and charge the rates applicable to the quantity of freight tendered regardless of who owned the separate articles. If the forwarder was shipper for the purpose of securing carload rates, it was also shipper for the purpose of classifying and valuing, in order to determine which tariff rate was applicable.

For greater reason must the forwarder be treated as a shipper within the meaning of the prohibitions against rebates and unjust discriminations. *United States* v. *Milwaukee Refrigerator Transit Co.*, 145 Fed. 1007, 1012.

If not,—if a carrier may refund to a particular forwarder a part of the freight money collected from him, forwarders who are denied that favor would be put at a great disadvantage. Nor would the discrimination stop there. It would extend to the owners of the goods, since a forwarder thus favored would be able to offer better terms to his customers than his rivals could offer to theirs. The way would thus be open for the very evils of discrimination, favoritism, and inequality which, as this Court has said, Congress intended "to cut up by the roots." *Louisville & Nashville R. Co.* v. *Mottley*, 219 U. S. 467, 478.

Sheldon & Company being thus the shippers of the traffic in consideration for the privilege of transporting which the payments in question are made to them, and payments by a carrier to a shipper in consideration for traffic being rebates and undue preferences within the settled meaning of the Act to Regulate Commerce, it follows that the payments made to Sheldon & Company by the Lehigh Valley Railroad are unlawful.

III.

Realizing, doubtless, the futility of contending that Sheldon & Company are not to be treated as the shippers of the traffic in consideration for which the

payments in question were made to them, the Railroad Company makes this further contention as we understand it: That a shipper of goods the routing of which is subject to the orders of a third person, may be employed and paid by a carrier to "solicit" such third person to direct that the goods be transported over its lines, notwithstanding the statutory provisions above set out requiring carriers to adhere to their published rates and prohibiting rebates.

If this contention were sound it would still fall short of meeting the present case, because as to an indeterminate part of the traffic in respect of which the payments in question were made to them, Sheldon & Company have complete dominion; that is, they not only make the contracts of shipment and pay the freight in their own right and name as forwarders, but they have full control of the routing.

The complete answer to the contention, however, is that no person *directly interested* in having specific goods transported can be given anything of value by a carrier in consideration for the traffic. This is so whether the interest be that of owner, seller, purchaser or bailee. Nor does it make any difference that the routing of the goods is subject to the orders of a third person, so long as the owner, purchaser, seller or bailee, as the case may be, is *directly interested* in having the goods transported.

Take the case of a manufacturer whose established course of business is to sell his goods *at his factory* and to ship them to the purchasers via such routes as the latter may designate. Obviously, payments by a

carrier to such a manufacturer for "soliciting" the purchasers of his goods to direct them to be routed via its lines would constitute a discrimination in favor of that manufacturer and a departure from the carrier's published freight rates.

There is no difference in principle between the position of such a manufacturer and a forwarder like Sheldon & Company. Each has a direct, pecuniary interest in having specific goods transported and that interest exists none the less because in each case the designation of the particular carrier is left to a third person. The great purpose of the Act to Regulate Commerce was "to compel the carrier as a public agent to give equal treatment to *all*" (*New Haven Case*, 200 U. S., 361, 391)—not alone to manufacturers or owners of goods, but to all *directly interested* in having specific goods transported. Being shippers within the declared meaning of the law, forwarders are just as much entitled to equality of treatment as manufacturers or shippers of any other class.

It is conceded, of course, that a carrier may employ and pay agents to solicit traffic for its lines. Doubtless it may even employ a shipper to solicit the traffic of *other* shippers. No such case, however, is presented. Here, in consideration of being awarded the transportation of specific goods, the carrier has made payments to the shipper of those very goods, who is directly and pecuniarily interested in having them transported. It is that practice which is attacked.

The cases cited by the Railroad Company in which persons who were shippers were also permitted to enter into other relations with the carriers are readily distinguishable from this case. In those cases the compensation was allowed, not in consideration for the shipper's traffic, but for the actual performance by the shipper of services constituting an integral part of the transportation—in *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, for elevating grain in transit; in *United States* v. *Baltimore & Ohio R. R. Co.*, 231 U. S. 274, for lightering and for use of terminal facilities; in *Mitchell Coal Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247, for the haulage of coal over spur tracks. In *D. L. & W. R. Co.* v. *Kutter*, 147 Fed. (C. C. A. 2d) 51, the position of Wescott, who received commissions on certain milk shipments, was analogous to that of an express company. There is nothing to indicate that he was himself the shipper of the traffic, and the opinion in fact refers to third persons as the shippers, and to Wescott as the manager of the traffic (p. 61).

IV.

The propriety of the decree is questioned on the grounds that it fails to adjudge that the challenged payments to Sheldon & Company are rebates and is not sufficiently definite to apprise the Railroad Company of what it is prohibited from doing.

These objections are raised for the first time in the Railroad Company's brief in this court. They were not assigned as error. With due respect, they seem to us captious.

The most superficial inspection will show that the decree contains an adequate adjudication that the agreements in pursuance of which the challenged payments were made to Sheldon & Company are unlawful as agreements for the payment of rebates. It then enjoins the further execution of the agreements. It is definite and certain throughout and just the reverse of a general direction to obey the law. It does not, as asserted (Appellant's Br., p. 26), "restrain appellant from transporting Sheldon & Company's shipments 'at rates and charges less than those named in the lawfully published and filed tariffs of said Lehigh Valley Railroad Company,'" but restrains appellant *from further carrying out the particular agreements adjudged unlawful* in any such manner as will permit Sheldon & Company's shipments to be transported "at rates and charges less than those named in the lawfully published and filed tariffs of said Lehigh Valley Railroad Company" (Rec., 43). It would have been sufficiently definite if it had stopped after enjoining the further execution of the particular agreements adjudged unlawful.

CONCLUSION.

The decree of the District Court should be affirmed.

G. CARROLL TODD,
Assistant to the Attorney General.

DECEMBER, 1916.

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In the Supreme Court of the United States.

OCTOBER TERM, 1916.

LEHIGH VALLEY RAILROAD COMPANY, appellant,
v.
THE UNITED STATES OF AMERICA, appellee.
No. 124.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF THE INTERSTATE COMMERCE COMMISSION.

STATEMENT OF THE CASE.

This is an appeal, taken by the Lehigh Valley Railroad Co., from a decision of the District Court of the United States for the Southern District of New York. The cause was heard by the district court upon bill and answer, Rec. pp. 3–29, and upon a stipulation of facts, Rec. pp. 30–32, and was determined by District Judge Hough, who filed a memorandum opinion, Rec. pp. 34–39.

The decree, Rec. pp. 41–43, enjoined the appellant from paying to George W. Sheldon & Co., pursuant

to contracts set out in the bill, commissions and a salary for soliciting for appellant's line traffic shipped in the name and for the account of George W. Sheldon & Co. The bill alleged that the payment of these commissions and salary was in violation of provisions of the act to regulate commerce, as amended, and of the Elkins act, forbidding unjust discriminations, undue preferences, and rebating.

The appellant is a common carrier engaged in interstate commerce, and by means of a connection at Buffalo and through route arrangements with the New York, Chicago & St. Louis Railroad Co. is engaged in the transportation of traffic between New York and Chicago.

George W. Sheldon & Co., hereinafter called Sheldon & Co., are incorporated under the laws of the State of Illinois, with offices in Chicago, Ill., and New York, N. Y., as well as in Liverpool, England, Paris, France, and other foreign cities. They are engaged in the business of a forwarder, an independent enterprise, the nature of which was defined by this court in *Int. Com. Com.* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235.

The greater part of the business of Sheldon & Co. consists in making up and forwarding, from nonadjacent foreign countries to points in the United States, carload and less-than-carload shipments for importers in the United States. Under contracts with such importers they advance money on the invoice value of goods handled, furnish drayage from foreign factories to inland railroad stations, as well as trans-

portation from inland stations to ports of transshipment, ocean carriage, and transfer from steamships at the port of New York to rail, attend to entries in the custom-house, including the payment of duties and the movement of shipments in bond, and furnish rail transportation to points of destination in the United States.

In making such contracts Sheldon & Co. fix the amount to be paid by the importer for rail and water transportation, including the movement of the traffic in interstate commerce within the United States. In other words, Sheldon & Co., as between themselves and the importer, fix an arbitrary and agreed charge for the transportation of the goods. Sheldon & Co. then ship the goods in their own name to themselves as consignees over the lines and through routes of the appellant from New York to Chicago and western points, and are charged by the appellant the published rates, less the commissions and salary hereinafter mentioned.

The appellant made verbal and written contracts with Sheldon & Co., appointing the latter its foreign agent for "soliciting traffic" for it and its connecting lines. For this service, so called, the appellant agreed to pay Sheldon & Co., for all traffic solicited or shipped by them over appellant's lines, a commission of 10 per cent of the published rates applicable to certain classes of goods; upon certain other classes of goods a commission of 5 per cent of the published rates; and for shipments under what are known as commodity rates, and "for other services," a salary of

$5,000 per annum. The traffic solicited consisted of the shipments made by Sheldon & Co. as forwarders.

The appellant, in its answer, Rec., p. 25, states that—

> * * * the traffic moving over the rails of this respondent [appellant] to interior points within the United States procured by the solicitation of George W. Sheldon & Co. represents an enormous volume of traffic, in the year 1910 alone amounting to 54,232,076 pounds, with a resultant revenue to this respondent of $185,883.05.

While Sheldon & Co., in their foreign offices, represent the appellant and may solicit some traffic which is not covered by *contracts with importers*, they are interested in such traffic as forwarders. As to all such traffic it is stipulated, Rec., pp. 31–32, that—

> * * * not less than a five-sixths portion thereof was and is traffic procured and contracted for by said George W. Sheldon & Co. with importers within the United States under contracts such as are alleged in petitioner's bill to exist between such importers and said George W. Sheldon & Co., and further was and is traffic for the transportation of which said George W. Sheldon & Co. receive compensation from such importers, as set out in paragraph "Eleventh" of the petitioner's bill herein, and upon such traffic commissions were paid to George W. Sheldon & Co. in the manner complained of in the bill herein. The balance of said traffic, to wit, one-sixth thereof, is procured and routed over respondent's line

> of transportation through and by reason of the activities of said George W. Sheldon & Co. in nonadjacent foreign countries, and in the shipment of all such traffic, both that secured in this country and abroad, George W. Sheldon & Co. performs generally the functions of a forwarder, and upon the arrival of the said traffic in the United States acts both as consignor and consignee in shipping such traffic in interstate commerce over and upon the line and route of transportation of this respondent.

It is alleged in the bill and admitted in the answer that other firms and corporations "are engaged in business similar to that conducted by George W. Sheldon & Co.," who are in competition with Sheldon & Co., and who contemporaneously ship similar traffic over the lines of the appellant and its connections from New York to Chicago, and who do not receive any commission or salary on account of the freight so shipped by them.

It is also alleged in the bill of complaint that Sheldon & Co., while in competition with other forwarders, have made rates to importers "at less than the actual cost of the said transportation to the said George W. Sheldon & Co." Rec., p. 13. This allegation is admitted by the appellant, Rec., p. 22, but—

> It avers, however, that in all cases where the said George W. Sheldon & Co. have entered into contracts for the importation of goods from nonadjacent foreign countries to points of destination within the United States for a sum less than the total transportation charges

> of the various carriers who participated in the transportation of such shipments that such contracts were due solely to the said George W. Sheldon & Co.'s inability to estimate the exact amount of freight charges that would be assessed by the various carriers, and that in no case has George W. Sheldon & Co. knowingly agreed to effect the transportation of such goods for a less sum than the total of the transportation charges of the said carriers.

It is stipulated with reference to this issue, Rec., p. 30, that:

> * * * George W. Sheldon & Co. at all times knew and were acquainted with respondent's lawful rates * * * and that any inability upon the part of George W. Sheldon & Co. to estimate the exact amount of freight and charges that would be assessed by various carriers * * * has no application to the rates, tariffs, and charges of the respondent, * * *.

Sheldon & Co. take out insurance upon their shipments while in transit, and present and collect claims for damages and loss to shipments while in transit from New York to Chicago. In fact, they are the shippers, and the only shippers known to appellant, as to this transportation, and all damages allowed by the appellant on account of overcharges, injury, or loss in connection with said traffic are paid to Sheldon & Co.

The profits realized by Sheldon & Co. out of the transportation part of their forwarding business arise, first, out of the excess over the published rates

charged by the company to importers; second, from the difference between carload and less-than-carload rates secured by means of assembling less-than-carload lots for different customers and shipping them at carload rates; and third, from the rebates which they receive from the appellant as so-called commissions and salary. As to the first and second sources of profit they are on an equality with competing forwarders, but as to the third, they are enabled to charge the importer the published rates or less than the published rates and still realize a profit, while their competitors can not realize any profit in such cases.

The sections of the act to regulate commerce prohibiting payments such as those here under consideration are as follows:

> SEC. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

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SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

SEC. 6. (*Amended Mar. 2, 1889. Following section substituted June 29, 1906. Amended June 18, 1910, and Aug. 24, 1912.*) That every common carrier subject to the provisions of this act shall file with the Commission created by this act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, * * * when a through route and joint rate have been established. * * * nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, * * *.

The material provisions of the Elkins act are as follows:

> SEC. 1. * * * it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced.
>
> SEC. 3. That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the circuit court of the United States sitting in equity having jurisdiction; * * * whereupon it shall be the duty of the court summarily to inquire into the circumstances, * * * and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and

> process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal * * *.

The bill in this case was filed under section 3 of the Elkins act.

QUESTION INVOLVED.

As stated by the district court, Rec. p. 39:

> This whole case revolves around the question whether under all the circumstances shown Sheldon & Co. are to be regarded as shippers for every purpose.

ARGUMENT.

I.

SHELDON & CO. ARE THE SHIPPERS OF THE TRAFFIC HERE UNDER CONSIDERATION AND NO OTHER PERSONS ARE KNOWN TO THE CARRIERS IN SUCH TRANSACTIONS.

The word "shipper" has but one definition, accepted by all lexicographers, namely, "one who sends goods from one place to another." The shipper is the sender—the one who tenders the goods for shipment. Under section 15 of the act to regulate commerce the shipper has the right to route the traffic where there are two or more through routes, and in such cases the ownership of the property shipped is immaterial. This was clearly settled by this court in the *Forwarding case, Int. Com. Com.* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235, wherein the Chief Justice, speaking for the court, said, p. 252:

> The contention that a carrier, when goods are tendered to him for transportation, can

> make the mere ownership of the goods the test of the duty to carry, or, what is equivalent, may discriminate in fixing the charge for carriage, not upon any difference inhering in the goods or in the cost of the service rendered in transporting them, *but upon the mere circumstance that the shipper is or is not the real owner of the goods* is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the *rights of shippers* as to demonstrate the unsoundness of the proposition by its mere statement. We say this because it is impossible to conceive of any rational theory by which such a right could be justified consistently either with the duty of the carrier to transport *or of the right of a shipper* to demand transportation. This must be, since nothing in the duties of a common carrier by the remotest implication can be held to imply the power to sit in judgment *on the title of the prospective shipper who has tendered goods for transportation.* [Italics ours.]

In the same case, referring to the English act from which sections of the act to regulate commerce are taken, this court said further, pp. 254, 255:

> It was therefore settled in England that the clause forbade the charging of a higher rate for the carriage of goods for an *intercepting or forwarding agent than for others.* * * *
>
> Conceding, for the sake of the argument, the correctness of the construction which we have given to the second section, it is urged that nevertheless, as a forwarding agent is a *"dealer in railroad transportation"* and de-

> pends for his profit in carrying on his business upon the sum which can be made by him out of the difference between the carload and the less-than-carload rate, and may discriminate between the persons who employ him, therefore the act to regulate commerce should be construed as empowering a carrier to exclude the forwarding agent as a means of preventing such discriminations. [Italics ours.]

In another case, involving classification by a forwarder, *Great Northern Ry. Co.* v. *O'Connor*, 232 U. S. 508, 514, this court, speaking through Mr. Justice Lamar, said:

> For, although the Boyd Co. was a forwarder, * * * *yet the railroad company was obliged to treat the forwarder as shipper*, * * *. This was the ruling in *Int. Com. Com.* v. *Delaware, Lackawanna & Western R. R.*, 220 U. S. 235, where it was held that the carriers were not concerned with the question of title, *but must treat the forwarder as shipper* * * *. If the forwarder was shipper for the purpose of securing carload rates, it was also shipper for the purpose of classifying and valuing, in order to determine which tariff rate was applicable. [Italics ours.]

That the forwarder is the shipper *for all purposes* was likewise recognized by the United States Circuit Court for the Eastern District of Wisconsin, in *United States* v. *Milwaukee Refrigerator T. Co.*, 145 Fed. 1007, 1011, 1012. In that case a brewing company had incorporated a refrigerator transit company and was

shipping its own products by the latter, as a device to secure commissions from railroads upon traffic which it furnished practically as a forwarding company. The question was whether or not the payment of commissions in such a case was a rebate under the Elkins act. Judge Baker, speaking for the court, said:

> But, under the conceded facts, as we view them, the refrigerator company in its relations with the railroads appears in another rôle—*that of shipper*. From the brewing company and other owners of goods intended for interstate and foreign transportation the refrigerator company obtains the exclusive right to route the shipments to all competitive points, and then withholds or gives the business according to the railroad companies' resistance or submission to the threat of diverting the traffic unless a tenth or an eighth of the freight moneys be paid to it. *Control of the traffic is as absolute in the refrigerator company as if it were owner, and in numerous transactions the owner is not the shipper.* And if an owner, having full dominion in all respects, conveys to another the dominion for transportation purposes, that other in all dealings respecting transportation should be deemed the owner and shipper. [Italics ours.]

In *United States* v. *Delaware, L. & W. R. Co.*, 152 Fed. 269, 273, the United States Circuit Court for the Southern District of New York, passing upon a demurrer to an indictment against the carrier for

paying rebates to the *owner* of goods shipped in violation of the Elkins act, held that:

> * * * the mere fact that a rebate is not paid *to the shipper*, but is paid to somebody else, is quite immaterial under the Elkins act. [Italics ours.]

Here the court clearly distinguished between the *shipper* and the *owner*, holding that a payment of commissions to any person connected with the goods shipped, as agent of the owner, was in violation of the Elkins act. Further construing that statute, the court said, p. 273:

> The test by this statute is whether the carrier has transported the property at a less rate than that named in the tariff. * * * If it is in fact a rebate, concession, or discrimination whereby the property is transported at a less rate than that named in the tariff, the unlawful act is committed.

From the foregoing authorities it is apparent that a forwarder is a shipper for all purposes within the purview of the act to regulate commerce.

In the case at bar the admitted facts show not only that the shipments were made by Sheldon & Co., but that the latter were named as consignor and consignee in the bills of lading covering such shipments. As alleged in the "Fifteenth" paragraph of the bill, Rec., p. 9:

> * * * in all such shipments George W. Sheldon & Co. contracts in its own right and name with the respondent for such transportation from New York to Chicago, the consignor and the consignee of said goods being the said George W. Sheldon & Co., * * *.

In the "Fourth" paragraph of the answer, Rec. p. 21, the appellant—

> Admits on information and belief the allegations contained in paragraphs "Ninth" to "Fifteenth," inclusive, of petitioner's complaint.

The answer also admits that Sheldon & Co. insure the property in their own name and receive and collect overcharges thereon as well as damages thereto while in the course of transportation. This practice, legitimate in itself, is absolutely essential to the business of a forwarder.

The foregoing decisions clearly sustain the conclusion of the court below, pp. 35–36, that—

> The relation of shipper and carrier is formal and must respond to certain well-known tests. It has no relation to ownership. A shipper is one who ships even when he has no right so to do; but a forwarder is one whose business it is to ship; and I am unable to see how it can be doubted (and I do not think it has been denied) that when Sheldon & Co. send goods over the Lehigh Valley road in their own name they are in a position to insure, to demand and receive delivery, and to recover for breaches of the contract of carriage entered into between themselves and the carrier;—these are the indicia of the formal and legal relation entered into by the issuance of a shipping receipt or bill of lading.
>
> I have no doubt that Sheldon & Co. are to be regarded as shippers for every purpose * * *.

II.

SHELDON & CO. BEING THE SHIPPERS, THE PAYMENTS IN QUESTION ARE WITHIN THE INHIBITIONS OF THE ACT TO REGULATE COMMERCE AND OF THE ELKINS ACT.

Section 2 of the act to regulate commerce prohibits a carrier from demanding, collecting, or receiving "from any person or persons a greater or less compensation for any service rendered" in the transportation of property "than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions."

The appellant admits, in the "Sixth" paragraph of its answer, Rec. p. 22, the allegation in the "Seventeenth" paragraph of the bill, Rec., pp. 10–11:

> That there are other firms and corporations engaged in the same general kind and character of business as that of George W. Sheldon & Co., and which compete with the said George W. Sheldon & Co. within the United States and in foreign countries, and which said competing firms and corporations consign goods from foreign countries to importers within the United States over and upon the line and route of the respondent, in interstate commerce, under circumstances and conditions substantially similar to those obtaining and prevailing with regard to the shipments handled by George W. Sheldon & Co., to which

> said competing firms and corporations, however, this respondent makes no such allowance, payment back, and return, as aforesaid, or otherwise, as is made by said respondent to said George W. Sheldon & Co.

The facts and conditions upon which the prohibitions of section 2 become operative are admitted to exist in this proceeding. The fact that these payments are made to Sheldon & Co. as "commissions" and "salary" for "soliciting" their own business does not take the case out of the operation of section 2 any more than it does out of the other sections hereinafter referred to. The direct and final result of the transaction is that Sheldon & Co. pay less than the published rates and less than the charges paid by other contemporaneous shippers of like traffic, under substantially similar circumstances and conditions.

Section 3 of the act makes it unlawful for a carrier "to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, [or] corporation * * *." That a preference and advantage is given to Sheldon & Co. by the payment of these commissions and salary is so patent as to require no argument.

As heretofore stated in this brief, Sheldon & Co. can charge the importers less than the published rates and still make a profit upon the transportation, while their competitors can not do so.

Section 6 applies to both individual and joint rates, prohibits the collection or payment of any charge for

transportation that is different from the published rate, and provides that no carrier shall—

> * * * refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, * * *.

If the appellant may pay these forwarders commissions to get their business, it may pay any other shipper for "soliciting" his business. There is no limit to which this kind of "soliciting" may be carried in the buying of traffic.

Referring to the Elkins act in *Armour Packing Co.* v. *United States*, 209 U. S. 56, 73, 75, this Court, speaking through Mr. Justice Day, said:

> * * * it is specifically made an offense to receive any rebate or concession *whereby any such property is by any device whatever transported* at a less rate than that named, published and filed by the carrier; * * *.
>
> Under the amended act, transportation, with a rebate, *or at a concession from the established rates*, is made an offense *as to the shipper* as well as the carrier, * * *. [Italics in second paragraph ours.]

In the "Fifth" paragraph of the answer of appellant, Rec., pp. 21–22, the transaction is stated thus—

> It admits that certain of the sums paid by it to the said George W. Sheldon & Co. for services rendered this respondent by that company *were computed upon freight charges received by this respondent for freight moving over its line* that was solicited and secured by the said George W. Sheldon, & Co. * * *. [Italics ours.]

As the shipments in question are admitted to have been made for and in the name of Sheldon & Co., *who were the shippers of the freight,* these payments were clearly deductions and concessions from the published rates.

Sheldon & Co. are said to be the largest forwarders of freight in this country. The appellant in its answer, Rec. p. 25, naïvely states that the business moving over its line in the name of and for Sheldon & Co.,—

> although comparatively small at the inception and during the first few years of George W. Sheldon & Co.'s employment, has gradually increased in volume so that at the present time the traffic moving over the rails of this respondent to interior points within the United States procured by the solicitation of George W. Sheldon & Co. *represents an enormous volume of traffic,* * * *. [Italics ours.]

Sheldon & Co.'s shipments grew to this "enormous" size only as their business as a forwarder grew, because the shipments were in their name as a forwarder. As their private business increased, under the stimulating effect of commissions and salary paid by the appellant, of course the *volume of their traffic* over appellant's line increased. The two things went hand in hand, the increase in Sheldon & Co.'s business as forwarders and the increase of the traffic shipped by Sheldon & Co. over the appellant's railroad.

That the evils of such a situation were recognized by the court below is evident from the conclusion of the district judge, Rec. pp. 37, 39:

> I am further of opinion that such letter must be strictly enforced in order to preserve equality among shippers, for the abuse of granting commissions to any large shipper is so patent and so ancient as not to require further comment. * * * I think they [Sheldon & Co.] are shippers, and any form of compensation to them for shipping is against the law.

III.

THE LAW OF AGENCY IS NOT INVOLVED IN THIS CASE.

Counsel for appellant insist upon the right of a carrier to employ agents to solicit business. As a general proposition, this is admitted. But that any carrier has a right to appoint any shipper as an agent to "solicit" his own business and to pay him a commission or salary therefor is indefensible. Yet that is just what is done in this case. Sheldon & Co. transport an "enormous" traffic, according to the admissions of appellant; they ship it, consign it, and receive it in their own name; they are engaged in the business of forwarders, and are the shippers, and the commissions and salary are paid them for "soliciting" their own traffic. Describing this arrangement as an "agency" or "solicitation" or "payment of commissions and salary" does not change the essential facts.

After stating that not less than five-sixths of the traffic is moved under contracts between Sheldon & Co. and importers, and that one-sixth is procured in other ways by Sheldon & Co., the stipulation of facts in this case, Rec. p. 31–32, proceeds:

> * * * *and in the shipment of all such traffic, both that secured in this country and abroad, George W. Sheldon & Co. performs generally the functions of a forwarder,* and upon the arrival of the said traffic in the United States *acts both as consignor and consignee* in shipping such traffic in interstate commerce over and upon the line and route of transportation of this respondent. [Italics ours.]

There is no law of agency that controls this case. The sole question is whether, by the device of an agency or the payment of commissions and salary, the appellant may "refund or remit in any manner or by any device any portion of the rates" charged to these shippers. As already pointed out, the appellant states in its answer that the amount of the commission is *"computed upon freight charges received" by the appellant for transporting the traffic of Sheldon & Co.*

In *United States* v. *Delaware, L. & W. R. Co.*, 238 U. S. 516, 535–6, this court, passing upon an attempt to evade the commodities clause of the act to regulate commerce, uncovered the entire transaction in order to get at the essential facts, and, speaking through Mr. Justice Lamar, said:

> The railroad company, if it continues in the business of mining, must absolutely dissociate

itself from the coal before the transportation begins. It can not retain the title nor can it sell through an agent. *It can not call that agent a buyer while so hampering and restricting such alleged buyer as to make him a puppet subject to the control of the railroad company.* [Italics ours.]

In *Armour Packing Co.* v. *United States*, 209 U. S. 56, 72, this court, speaking through Mr. Justice Day, declared:

> The Elkins act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published, and posted, as required by law. It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published.

In *Louisville & Nashville R. Co.* v. *Mottley*, 219 U. S. 467, 483, this court, speaking through Mr. Justice Harlan, said:

> After the commerce act came into effect no contract that was inconsistent with the regulations established by the act of Congress could be enforced in any court. The rule upon this subject is thoroughly established.

IV.

THE PAYMENTS HERE UNDER CONSIDERATION ARE FORBIDDEN BY THE ELKINS ACT AS WELL AS BY THE ACT TO REGULATE COMMERCE.

Counsel for appellant, in the first sentence of their argument, admit, p. 7, that:

> *Any payment* by a carrier to a shipper to compensate the shipper *for routing its own shipment* via the carrier's line *is a rebate;* * * *.

This states the law precisely as applicable to this case. Sheldon & Co., as forwarders, are the shippers in each instance; their business requires that they be the shippers; the railroad recognizes them as the shippers. All the traffic turned over by them to the appellant consists of their own shipments, and the commissions and salary paid to them are to secure the routing of such traffic over the lines of the appellant.

Counsel, however, then suggest that a—

> *reasonable payment* by a carrier to a solicitor to compensate it *for inducing third persons to permit shipments to go* via the carrier's line is a legitimate compensation.

In answer to a somewhat similar contention in the court below, it was said, Rec. pp. 36–37:

> This is all true, but I do not think that the situation is brought within this decision [*United States* v. *Delaware, L. & W. R. Co.*, 152 Fed. 269] when a shipper is employed and the amount of his wage or the value of his services is regulated or gauged by the freight value of his shipments. * * * the result in my

> judgment is illegal because of the bald fact that when the dealings between Sheldon & Co. and the railroad are ended, the result is that Sheldon has paid less for the transportation of goods in which he had a special property, and as to which he was a shipper, than did other persons * * * the abuse of granting commissions to any large shipper is so patent and so ancient as not to require further comment.

The sentence last quoted from appellant's argument is carefully worded to make it fit its theory of this case. The usual statement would be that a carrier has the right to appoint an agent and compensate that agent for *securing* traffic. As, in this case, the traffic is the traffic of the so-called agent, and there is a possibility that the importer might insist on routing the freight, counsel state the proposition as a right to compensate "for inducing third persons *to permit* shipments" to go by appellant's line. The instances in which importers undertake to route the traffic within the United States must be very few. The complaint in this case, in the "Twelfth" paragraph, Rec. p. 8, states that:

> Under some of the said contracts with importers the said importers have the right to, and in some instances do, designate the carriers within the United States to be employed for the transportation of the goods moving under such contracts; and in such contracts the names of such carriers as are to transport the goods mentioned in such contracts are set forth.

The fact is that all the traffic here under consideration moves in the name of Sheldon & Co. as forwarders. The forwarders are the shippers, and any payment to them to secure the routing of traffic over appellant's line is a rebate. It is also a palpable discrimination against other forwarders who are not so favored.

Counsel for appellant cite several cases, on page 13 of their brief, to the effect that payments may be made to a shipper for services. Not one of these cases, however, refers to or justifies a payment for services in securing or in routing traffic over a carrier's line. They are all cases arising under the provision of section 15 of the act to regulate commerce, that—

> If the owner of property transported under this act directly or indirectly renders any service *connected with such transportation*, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may * * * *determine what is a reasonable charge as the maximum to be paid by the carrier*, * * *. [Italics ours.]

In the *Diffenbaugh case*, 222 U. S. 42, 45, one of the cases cited by appellant, this court, speaking through Mr. Justice Holmes, said:

> Thus, Congress clearly recognized that services such as those rendered by Peavey & Co. *were services in transportation* and were to be paid for, notwithstanding the possibility that

some advantage might be gained as a result. [Italics ours.]

The elevators were held in that case to constitute a link in the transportation service which the carrier might be compelled to furnish upon request, and therefore to fall within the provisions of the act permitting a reasonable compensation to be paid a shipper for transportation services.

In the *Lighterage case*, 231 U. S. 274, also cited by appellant, lighterage was one of the elements of the transportation service to and from New York. The fact that the shipper's traffic was included did not affect the operation of the statute. The act expressly provided for payment to a shipper for transportation performed, or transportation facilities furnished, by the shipper. But there is no provision in the statute whereby a carrier may lawfully pay to a shipper any compensation for securing traffic, even where the shipper receives compensation only for traffic other than his own. Surely there is nothing in the cases cited by appellant that justifies a carrier in paying to a shipper for routing his traffic over its line commissions computed upon the basis of the published rates applicable to such traffic.

CONCLUSION.

Sheldon & Co. are shippers within the purview of the act to regulate commerce. The commissions and salaries here involved are paid to those shippers as a consideration for the traffic shipped by them over the appellant's line. Such payments

clearly constitute a concession from the charges lawfully applicable to the shipments made by Sheldon & Co. and enable the latter to contract profitably with importers for transportation services at less than published rates, while their competitors not so favored are thereby subjected to undue prejudice and disadvantage.

The contention of appellant that the commissions in question are lawfully paid to Sheldon & Co. as carrier's agents is refuted by the fact that such payments are made by appellant out of revenues received from traffic shipped by Sheldon & Co. and are computed upon the basis of the freight charges paid upon such shipments. Such payments, therefore, clearly constitute direct rebates from the published rates and are in violation of the Elkins act as well as of the act to regulate commerce.

The conclusions of the district court and its decree prohibiting the payment by appellant of the commissions and salaries here under consideration should be sustained.

Respectfully submitted.

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